RELIGIOUS OFFENSE AND THE CENSORSHIP OF PUBLICATIONS IN INDIA LAW, LEGAL PROCESS AND THE ROLE OF JUDICIARY

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RELIGIOUS OFFENSE AND THE CENSORSHIP OF PUBLICATIONS IN INDIA: LAW, LEGAL PROCESS AND THE ROLE OF JUDICIARY

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ABSTRACT

In this work, I analyse the role of judiciary in the process of censorship in India. Focussing on the subject of "Religious offense and censorship of publications," I examine the rationales and justifications given by courts to restrict freedom of speech and expression. I argue that the issues like public order, and the concern to protect religious sentimentalities of different communities from hurt in a secular democracy, form the bedrock on which the courts construct the legal justification for curtailment of right to freedom of expression. In the process, the courts define the "reasonability" of restrictions, as advocated under article 19(2) of the constitution, very expansively, thereby allowing wide latitude for state intervention in the free exercise of this fundamental right. In a way, the position of the courts reflect a sense of legal patronage for state action against misuse of freedom of speech and expression, and it also exhibits a form of legal paternalism where the courts educates the citizens regarding the permissible limits of "matter" and "manner" of speech acts.

I further argue that this attitude of the courts, along with the ambiguity attached with the nature of statutory laws, and the structural and procedural limitations of the legal process creates a "web of censorship" that fails to provide the legal protection required for the free exercise of the right to freedom of speech and expression. However, despite these limitations, and increasing intervention of non-state actors in the process of censorship, the role of courts cannot be undermined. As the constitutional authority to interpret and define the scope of freedom of speech and expression, they continue to play a dominant role in the politics of censorship in Indian context.

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LIST OF ABBREVIATIONS

AIMF	:	All India Minority Forum
AIR	:	All India Reporter
CAD	:	Constituent Assembly Debates
CPI (M)	:	Communist Party of India (Marxist)
CriJL	:	Criminal Law Journal
CrPC	:	Code of Criminal Procedure
CSDS	:	Centre for the Study of Developing Societies
DMK	:	Dravida Munnetra Kazhagam
ECHR	:	European Convention on Human Rights
ECtHR	:	European Court of Human Rights
ICCPR	:	International Covenant on Civil and Political Rights
IPC	:	Indian Penal Code
LSD	:	Lok Sabha Debates
MIM	:	Majlis-e-Ittehadul Muslimeen
NMML	:	Nehru Memorial Museum and Library, Delhi
PUCL	:	People's Union for Civil Liberties
RSD	:	Rajya Sabha Debates
RSS	:	Rashtriya Swayamsevak Sangh
SAHMAT	:	Safdar Hashmi Memorial Trust
SCC	:	Supreme Court Case
SCR	:	Supreme Court Reporter

CHAPTER 1

INTRODUCTION

1. Freedom of Speech and Expression in India: Issues and Problems

"The writer Perumal Murugan is dead."

This announcement was made by Perumal Murugan, a Tamil writer, in his facebook post on January 12, 2015.[1] It reflected the state of the writer's mind after one of his very popular novels *Madhorubagan* (One Part Woman), first published in December 2010 and, a recipient of several prizes and accolades, suddenly became the subject of controversy in 2015. *Madhorubagan* was set in a village near Tiruchengode (Namakkal district) during the colonial period, and it told of the social stigma faced by a childless couple.[2] The controversy over Murugan's novel erupted when, in December 2014, some pages of the novel were photocopied and distributed along with a handbill that accused the author of demeaning women belonging to the Kongu Vellala community (also called Gounders), and vilifying an old tradition attached to the village temple. The accusation took a dramatic turn after around 40 different caste-based outfits, mobilized by the local leaders of the Rashtriya Swayamsevak Sangh (RSS)[3] decided to launch an agitation against the author for presenting in a poor light the character of Gounder women and the old temple ritual, which they held, brought a bad name to Tiruchengode. The town was shut down in protest, and the author received threats to his

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1 "Tamil author Peral Mumurugan announces his death on facebook over lack of freedom of speech," *Indian Express*, January 15, 2015.

2 The novel highlights the plight of Kali and Ponna, the protagonist couple, and while discussing their attempts to conceive it also referred to an age old local custom of the community which, according to temple laws, allowed consensual union among consenting adults outside of marriage during village festival to overcome the problem of childlessness. More than 5000 copies of the novel had been sold and on popular demand a translated version with the title One Part Woman was published by Penguin in 2013. Two sequels to the novel had also been published.

3 RSS is a right-wing cultural organization, argued to be very close to the Bharatiya Janata Party (BJP), a prominent political party in India.

life, from the local community. Though no formal ban was placed on the book, the attitude of the district administration created a sense of forced censorship.[4] On 12th January the District Revenue Officer, V. R. Subbulakshmi, who also served as Additional District Magistrate, convened a "peace committee meeting," to which Murugan along with his lawyer were also invited. However, in the meeting, Murugan and his lawyer were not allowed to present his case, nor was he allowed to meet the protesting groups. Rather the authorities ordered him to sign a statement, as has been demanded by the protesting groups, which stated that the author wished to apologize unconditionally, agreed to recall all copies of the book, change controversial references and paragraphs, and never in the future to write anything connected with Tiruchengode. In order to buy peace, the district administration had, it would seem, sacrificed the freedom of speech and expression of P. Murugan. Murugan's subsequent facebook post claiming his death as a writer was a reaction to these events, which he claimed had left him "insecure and disgusted."[5]

This episode is just one instance among many, which illuminate forms of censorship that are operational in the Indian society. The case of Murugan also exposed different layers involved in the process of censorship as it operates in the Indian context – and helps us to see the reasons for its remarkably high success rate. Let me highlight some of the important issues involved in this case. First, when the book was originally published in the local language (Tamil) more than four years before the incident, there was no protest against the content of the book. In fact, it became a bestseller with the publisher selling more than 5000 copies, before the controversy began.[6] The gap between the time of publication and the claims about hurt sentiments suggest other

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4 This is reflected in the affidavit submitted by Perumal Murugan in the High Court in connection with the court case over his book.

5 Murugan expressed his anguish in an affidavit that was submitted to Madras High Court on his behalf, where a plea to dismiss the undertaking had come up (W.P. No. 2668 of 2015). Ilangovan Rajasekaran, "Writer Speaks Out," *Frontline*, March 20, 2015, http://www.frontline.in/the-nation/writer-speaks-out/article6955375 .ece.

6 This is a part of the information provided by S. R. Sundaram as the publisher of Murugan's book in a counter affidavit filed in the case, S. Tamilselvan and other v. The Government of Tamil Nadu and others, (2015) W.P. No. 1215 of 2015.

intervening factors at play. Second, the attitude of the government authorities of Tamil Nadu was open to question. The district administration claimed that its action was the best to control a potentially disruptive law and order situation in the town. In the "peace-meeting", the administration brokered a one-sided deal which both provided legitimacy to the claims of hurt by the protestors, and ensured that their demands were met. The administration did not investigate as to who was responsible for the circulation of photocopies of selective portions from the book, which had incited the harassment of Murugan by local groups. Nor was the police interested in finding the people who had threatened Murugan, and his family members. The message was clear: the district administration wanted to avoid public order problems, and it was convinced that the freedom of expression of the author was a small price to be paid to secure that.

The third important aspect related to the case, which has often been ignored by analysts and commentators, was the role of the court. After Murugan was forced to sign the compromise letter by the district authorities, several organizations including PUCL (People's Union for Civil Liberties) filed writ petitions in the Madras High Court, highlighting two issues: first, the continuous harassment of Murugan by "caste and religion based groups"[7]; second, the role of state authorities, in particular in pressurizing Murugan to sign the agreement. Based on these issues, the request was made that the court declare the agreement as "illegal, unconstitutional, and not being enforceable." The first petition in this regard was filed on 26th January, 2015. The High Court later hinted that it wanted to hear directly from Murugan on the matter, and would club all the relevant petitions together. Petitions were also filed by Murugan's opponents requesting the court to order the government to ban the book, and carry criminal proceedings against Murugan for disturbing communal harmony and vilifying religious practices. Within a month, Murugan submitted his reply in the form of an affidavit where he spoke out about his experiences, as well as his discomfort with the attitude of the state authorities. However, it took more than one and half years for the

[7] The petition was filed by S. Balamurugan, General Secretary of PUCL in Tamil Nadu and appeared as S. Balamurugan vs. The Government of Tamil Nadu and others, (2015) W.P. No. 2668 of 2015.

court to pronounce its final judgment on the subject.[8] Such delays in judgment, by creating uncertainty as far as the issue of legality is concerned, have proved a block against the defenders of the right to freedom of expression. In the academic and philosophical debates about free speech, scholars have argued that incidents such as the Murugan case have a tendency to produce a "chilling effect," which serves as an informal mode of censoring freedom of expression.[9] Murugan's case is a representative instance of a looming complexity exhibited in the functioning of the Indian state and society, when claims of religious offence are directed against the fundamental freedom of speech and expression.

But such phenomena are not new for Indian society, and a historical survey of case laws and the archives of newspaper and periodicals suggest that the fundamental right to freedom of speech and expression has, since its inception as a constitutional provision, routinely faced challenges in the Indian context. In this thesis, I seek to analyze the role that law and legal process have played in the debates surrounding issues related to freedom of speech and expression in India. When the constitution of independent India was being drafted and the fundamental rights provisions were being discussed – of which the right to freedom of speech and expression was a significant part – the constitution makers gave a special role to the judiciary: that of safeguarding citizens' fundamental rights from encroachment either by individuals, groups or the executive. It was assumed that in case of contradictions and controversies, the judiciary would act to protect the rights of citizens. I therefore make a primary focus of my thesis the issue of understanding how the courts have interpreted the Constitutional provisions that guarantee freedom of speech and expression and also the laws that allow for its restrictions.

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8 The Madras High Court finally pronounced its judgment in the case on July 5, 2016, almost one and half years after the petition had first appeared in the court. The judgment appeared as *S. Tamilselvan,* W.P. No. 1215 of 2015.

9 Chilling effect applies to cases where state might not directly censor free speech, but its role produces conditions which lead to self-censorship. It may either be due to uncertainity in legal sanctions or unfriendly attitude of administration or any such reasons. See, Gara LaMarche, "Some Thoughts on Chilling Effect," *Art Journal* 50, no. 4 (1991): 56-58.

As the field of freedom of speech and expression is too broad, I limit the scope of my study to the specific subject of censorship of publications. In order to gain further focus, I will concentrate in this thesis on contentious writings which invoked religious issues, and which were claimed to be "offensive" to religious sensibilities by different socio-religious groups. On such grounds, demands were raised for proscription, forfeiture or the banning of such publications. One reason for my choosing to focus on this topic is that the issue of censorship of publication has become a prominent issue in Indian politics. In recent years, several prominent cases, such as the pulping of Wendy Doniger's book, [10] have become the subject of intense public controversy. One of the important questions raised by this case centered on the role of the courts – in particular, whether the courts could and should have played a more active role in the case. But Doniger's was not the only book subject to the wrath of the claims of hurt sentiments of social groups. Scholars who have studied censorship in India have shown that since Independence there have been many publications that became embroiled in such controversies, and were either banned or censored by the authorities – who routinely cited reasons like a threat to public order or the hurt caused to the religious sentiments of different communities.[11] In many such cases, the aggrieved party, either the author or the publishers approached the court for relief. The decision of the courts in these cases brought the controversy to an end within a finite period, and also contributed positively to the discourse of freedom of speech and expression in India.

The topicality of the subject was not the only reason for choosing the field of censorship of publications, for research. The choice was also based on the representative nature of the subject. First, in India, where the average literacy rate is very low,[12] it is striking to note how a publication can generate controversy over hurt caused by the publication's content. Moreover, most of the books that attracted controversy were not aimed at

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10 I discuss the details of this case in chapter 5 of this thesis.

11 See, Girja Kumar, *The Book on Trial: Fundamentalism and Censorship in India* (Delhi: Har Anand, 1997); Rajeev Dhavan, *Publish and be Damned: Censorship and Intolerance in India* (New Delhi: Tulika Books, 2008).

12 Literacy rate in India, according to census of 2011, is 74.04%. Data used from the official website of Census of India and is available at http://censusindia.gov.in/2011-prov-results/datafiles/india/Final_PPT_2011_chapt er6.pdf.

public consumption. The price of the book, on the one hand, and the specificity of the subject (especially in cases of academic studies, such as Doniger's), on the other hand, should have acted as hurdles to any broader public reception or awareness. It is easier, for example, in case of visual representation, like films and cartoons, to reach to a wider audience, and attract opposition, in case it is controversial. Therefore, the chances of publications being a cause of hurt sentiments, is much lesser than in case of other modes of expression. But it has been seen that publications have become equally controversial, and attracted censorship, similar to visual forms of expression. In the case of controversies regarding publications, rumours and hearsay play important roles in spreading the content and its interpretation.[13] Also, in many cases in order to ignite controversy, the groups claiming offence often distributes photocopies of the controversial portions of the book or publication. For example, in Perumal Murugan's case, this had a major role in creating public opinion against the book after 4 years of its initial publication. So, it can be argued that, the censorship of publications can act as a hard case to understand how the process of censorship operates in Indian society.

Second, the censorship of publications also serves as a representative case to understand the legal boundaries of freedom of speech and expression. One of the reasons is that the statutory laws invoked in most cases of censorship are almost the same. For example, section 295(A) of the Indian Penal Code (IPC), related with hurting religious sentiments, and section 153(A), related to promoting enmity between two classes of citizens, has been routinely used by government authorities as well as non-state actors in their efforts to censor different forms of expression. In 2001, the Government authorities in Delhi used the provisions of section 153(A) and 295(A) to disallow a public exhibition arranged by SAHMAT (Safdar Hashmi Memoria Trust) group.[14] Similarly, in the case of the artiste M. F. Hussain, the petitioners had filed criminal

[13] The mobilization of Muslims in several parts of India (as in Mumbai and Kashmir), after the 'Rushdie affair' is a glaring example of this phenomenon. The book *The Satanic Verses*, was already banned, and could not be imported, so the chances that all who participated in such mobilizations and protests had actually read the book, is very low.

[14] The case appeared in Delhi High Court as The Trustees of Safdar Hashmi Memorial Trust v. Govt. of NCT of Delhi, (2001) CriLJ3689. SAHMAT is a left-oriented cultural organization that includes academicians, artists and others, and it claims to promote the values of pluralism and secularism in Indian society.

charges against the painter under the same statutory laws. Equally, controversies related to censorship of publications highlights the interplay of power relations between important stakeholders – the government agencies, the courts and the non-state actors.[15] So, a study of the controversies surrounding censorship of publications, as in this thesis, even acts as a representative sample for understanding the role of law and legal process in the process of censorship, of different forms of expression.

The claims regarding hurt caused to religious sensibilities have been one of the prominent reasons invoked for censoring and banning publications in India. Although government authorities have also exercised their legal powers against books that were adjudged to be against the national interest, defamatory of individuals, or deemed for obscene, the contentions based on religious subjects have been vital. One important reason for this has been the fact that claimants of hurt sentiments have often used the logic of another fundamental right i.e. right to freely profess, practice and propagate their religion, guaranteed by article 25 of the Constitution.[16] Criticism of publications about religious subjects that have been found contentious are primarily based on the argument that it interferes with this fundamental right, and hence such publications are legally liable to censorship. So, focussing on publications that are considered contentious in religious terms also enables us to gain a broad understanding of how legal processes India deal with situations where two different fundamental rights are in contention – freedom of speech and expression guaranteed under Article 19(1)(a), and freedom of religious practice guaranteed under article 25. The role of courts becomes central in such cases, and judges try to maintain the sanctity of both rights by creating a form of balance. How this balance is achieved is a matter of enquiry, and I have argued (in chapter 4) that a study of court proceedings suggest that courts in India prefer to restrict freedom of speech and expression if any way it is found to threaten the secular and plural values of India, of which article 25 has been held up as the most significant safeguard. The space for

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[15] The case was dealt by the Delhi High Court as, Maqbool Fida Hussain v. Raj Kumar Pandey, (2008) Crl. Revision Petition No. 114/2007.

[16] Article 25 provides for Freedom of conscience and free profession, practice and propagation of religion. Clause 1 of the article is most important which reads "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

protecting religion from vilification and insult to religious beliefs is also protected by statutory laws, especially section 295(A) of the IPC. The courts in India, in different cases, have also justified the constitutional validity of this law as well as its continuing relevance.[17] It is for these reasons that a study of the subject of censorship of publications dealing with religious subject can, I shall argue, illuminate a range of different issues surrounding freedom of speech and expression as well as legal censorship.

2. Research Questions

The demand for censoring or banning a publication with a religious subject can be based on different grounds: feeling of offense, hate, vilification, discrimination, or threat experienced by individuals belonging to the target religious groups, or the feeling of any disruption or interruption in the enjoyment of the constitutionally guaranteed freedom of religion; it can also occur when government on its own decides to prohibit certain types of speech on the pretext that such speech may hurt sentiments and pose a threat to public order (tools like censorship of books, banning of books under Customs Act etc.). In such controversies it becomes the responsibility of the state to balance contradictory claims and at the same time to ensure that the fundamental rights of citizens are protected. Further, any such case is open to scrutiny by the judiciary, whereby a rational assessment of the executive's action and its legality is undertaken. The response, both from government and the judiciary, is largely based on their interpretations of the provisions laid down under the Constitution, as well as other legal resources. As legal scholars have pointed out, the executive often takes the easy course by either banning the publication or arresting the accused writer/publisher, citing the threat of public disorder.[18] As a result, it falls upon the judiciary to play the role of defender of the right to freedom of speech and expression.

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[17] The constitutional validity of 295(A) was challenged in the Supreme Court in Ramji Lal Modi v. State of Uttar Pradesh, (1957) AIR 620. The court upheld the law and maintained that it was well within the limits prescribed under article 19(2) of the constitution. Since then courts have continuously cited this case as a defence for the validity of section 295(A).

[18] See, Dhavan, *Publish and be Damned*, 151.

The judiciary in India, as in other democracies, plays a very significant role in the life of its citizens. A study by the CSDS (Centre for the Study of Developing Societies) in 2015 shows that, it is one of the most trusted institutions in India.[19] As the guardian of fundamental citizen rights, the courts enjoy considerable respect and legitimacy in the eyes of the people. For such reasons, advocates of free speech look towards the courts with high expectations. However, the history of free speech jurisprudence in India reflects a complex dynamics, emerging from a balance based on respect for group identities and rights as well as individual rights.[20] The balance is not fixed, and there is always a scope for its shift of prioritizing one over other. In the context of fundamental rights, the challenge of balancing was clearly reflected in the concerns of the constitution makers. Although the constitution guaranteed individual political rights and civil liberties, all these were severely circumscribed. The cultural community, on the one hand, and national interest, on the other, curtailed the free exercise of these rights.[21]

The legal apparatus to control freedom of speech and expression was historically handed down by the British, who took it upon themselves to codify criminal and civil laws in India. They devised far reaching laws that were considered relevant according to the needs of the colonial context. Some of these laws were initiated to maintain their control over means of free expression, especially the press, in order to avoid its use in cultivating mass unrest by the nationalists, and other laws were devised in order to legitimize the authority of the British, as neutral arbiters of diverse cultural and religious interests that communities in India represented. However, even after independence, the government and law makers of the day, decided to incorporate the existing colonial legal codes, mostly without amendments, into the statutory laws of free India. This approach of the postcolonial state to appropriate laws devised by the

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19 The report prepared by Lokniti, CSDS, entitled "Democracy in India: A Citizens' Perspective" is available at http://www.csds.in/events/report-%E2%80%98democracy-india-citizens-perspective%E2%80%99.

20 Rajeev Bhargava, "Democratic Vision of a new Republic: India, 1950," in *Transforming India*, ed. Francine R. Frankel, Zoya Hasan, Rajeev Bhargava and Balveer Arora (New Delhi: Oxford University Press, 1999), 26-59.

21 Gurpreet Mahajan, *Identities and Rights: Aspects of Liberal Democracy in India* (Delhi: Oxford University Press, 1998), pp. 155-8.

British has consistently faced criticism.[22] It is equally true that a study of the legislative proceedings of the colonial period reveal that some Indian representatives raised pertinent issues with regard to British attempts to insert newer laws or amend older ones.[23] But, as shown in chapter 2, there was a consensus that free speech needed to be curbed in order to protect other interests. These concerns, like those of public order and protecting religious sentimentalities of different communities from hurt, formed the bedrock on which the edifice for the legal regime to control free speech was constructed. After independence, though the nature of Indian state and its character changed significantly, the concerns regarding probable harm of free speech remained similar as during colonial period. Challenges like partition, and other events that marked the birth of India as a free nation, warranted a fresh consideration of the legal aspects in order to avoid crisis at the level of internal security and prevent public order issues. The new set of challenges forced amendments to the constitution, most significantly to those articles that dealt with freedom of speech and expression, in order to strengthen the executive's control. The justification forwarded, as discussed in chapter 3, was that the citizens of a free nation should entrust confidence in its democratic government to protect and promote the interests of its citizens. This paternal attitude is explicitly reflected in the debates of the Parliament when amendments were introduced to the constitutional provisions as well as the statutory laws.

At the same time, the pragmatic vision of the law makers inspired a regime of laws whereby the judiciary was granted the power to review executive decisions regarding important fundamental rights, and at the same time it could adjudicate the scope and relevance of the laws with changing times. Constitutionally, the first amendment to the constitution added the clause of "reasonability" in relation to restrictions placed on

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22 See, Bhairav Acharya, "Free Speech in India: Still Plagued by Pre-modern Laws," *Media Asia* 42, no. 3-4 (2015): 157-60; Lawrence Liang, "Free Speech and Expression," in *The Oxford Handbook of The Indian Constitution*, ed. Sujit Choudhary, Madhav Khosla and Pratap Bhanu Mehta (New Delhi: Oxford University Press, 2016): 814-833.

23 This aspect has been further elaborated in Chapter 2 of this thesis.

freedom of speech and expression under article 19(2) of the constitution.[24] This "reasonability" test provided the court with a tool to keep a check on the arbitrary actions of the government and thereby to protect individual right to free speech from regulation even in the name of public order or protecting socio-cultural rights. Other than this, the constitution under different articles has empowered the courts in India with the power of judicial review as the custodian of fundamental rights, whereby it can sit on any law created by the state that appears to be contravening any provisions of fundamental rights.[25] The power to adjudicate on cases of freedom of expression also drew from the provisions of the statutory laws. For example, Section 96 of the CrPC (Code of Criminal Procedure) allows for any interested person to challenge the decision of forfeiture or ban of any publication by the government in the respective High Courts. Such provisions ensured that after independence the courtrooms became important arenas for struggle over the limits of freedom of speech and expression.

Based on this broad understanding, my research focuses on two central questions: a) how has law and legal process contributed to our understanding of freedom of speech and expression in India?; and b) what role do courts in India play in the debates about free speech? In order to develop a more focussed reading of the issues I breakdown these two general questions into more specific ones – a) How did the idea of censorship evolve from the colonial period and what has been the role of socio-religious groups in that evolution? b) What has been the constitutional and legal framework devised by the Indian constitution makers vis-à-vis censorship and freedom of expression? c) How have amendments to the constitution and the statutory law shaped the legal discourse about freedom of expression in India? d) How do courts reason out restrictions on freedom of expression in the Indian context especially in case of contentious publications that are claimed to be offending religious sensibilities of certain sections?

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[24] Article 19(2) of the constitution allows the validity of existing laws and empowers the government to make new laws vis-a- vis free speech, only if the laws impose "reasonable restrictions" and is "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

[25] Article 13, 32, 226 of the Indian constitution empowers the courts to sit on review of the laws made and check its validity.

e) How do structural and operative limitations of the Indian courts contribute in shaping the debate over free speech in India? f) How do we view the role of non-state actors in censorship, in the light of legal debates in India?

3. Conceptual Terrain

3.1. Freedom of Speech and Expression and Legal Intervention: A Comparative Perspective

Freedom of speech and expression has always enjoyed a special value within liberalism. However, though on the one hand almost everyone seems to agree that freedom of speech and expression are important and that they ought to enjoy special legal protection which does not extend to any other class of acts in society, at the same time, there is no real agreement amongst philosophers, lawyers, legislators, and citizens as to why such freedom is important, and how much freedom might be too much freedom. Historically, the primary justifications put forward in favour of freedom of speech fall in one of these four categories – a) for the purpose of promotion of truth (or the marketplace of ideas theory)[26]; b) its benefits to democracy and self-government[27]; c) its role in promotion of other virtues that survives society[28]; and d) its contribution to individual's self-realization and self determination (the autonomy based defence of free

[26] See, Thomas I. Emerson, *Towards a General theory of the First Amendment* (New York: Random House, 1966); J.S. Mill, *On Liberty* (Indianapolis: Hackett Publishing Press, 1978). The advocates of this idea view freedom of speech and expression as instrumental to the discovery of truth. It is held that the freedom to disseminate new information and to criticize prevailing views is necessary for eliminating misconceptions of fact and value. This search-for-truth rationale is based on the assumption that a marketplace of ideas can prove effective is progressing towards truth.

[27] Alexander Meiklejohn, "Freedom of Speech", in *Limits of Liberty*, ed. Peter Radcliff (Belmont, California: Wadsworth Publishing Co., 1966): 19-26. Meiklejohn's focuses not so much on the speaker's right to speak, but the listener's right to hear. The basis of a democratic government, Meiklejohn argues, is citizen's consent. It is only through the free exchange of ideas and a free press that citizen's will be exposed to the ideas, opinions and views which they require in order to participate effectively in democratic decision making.

[28] See, Lee C. Bollinger, *The Tolerant Society* (New York: Oxford University Press, 1988). Bollinger attempts to arrive at a free speech principle which begins, not with trying to establish the benefits that flow from it per say, but the relationship between its reception and other values; in this case what he terms "tolerance", in society.

speech)[29]. However, none of the advocates of these justifications completely dismiss the need for any kind of state intervention. For example, though Mill advocates that freedom of speech is important to produce a marketplace of ideas which could get us closer to truth, he also devises the "harm principle" and argues that government interventions could be valid if it was aimed to neutralize speech acts that had high potential to cause harm to others.[30] At the least, what can be understood by the forms of justifications forwarded in favour of freedom of speech is that the advocates of these justifications support the idea of "neutrality" – both "content-neutrality" and "view-point neutrality" – in state intervention. It means that state action should neither be based on the content of the speech act, nor on the viewpoint that the speech act represented. However, there have existed, broad disagreements about cases where the state should intervene, and also about the limitations of such interventions. For example, there is wide acceptance that "child pornography" should be banned, but there are existing debates about whether the state is justified in making laws to regulate "adult pornography", "blasphemy" and, forms of speech which is widely referred to as "hate speech." It has been observed that, regardless of the theoretical debates on the issue, most governments across the world have made provisions in law to restrict free speech in some form or other.

Even international law, which vociferously defends the right to free speech, recognizes the need to allow some liberty to member states to legislate in order to balance free speech against its harms. For example, Article 19(2) of ICCPR (International Covenant on Civil and Political Rights) of the United Nations provides for the right to freedom of expression. However, it also allows the member states to restrict free speech by law under clause 3 of the same article, if such restrictions are meant to protect "*rights" or "reputation" of others, or for national security or public order or of public health and morals*. It is further specified under article 20(2) that "*any advocacy of national, racial*

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[29] See, Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford: Oxford University Press, 1989). Baker argues that speech should be protected, not as a means to achieve a collective good but because of its value to the individuals as it fosters individual's self-realization and self determination without improperly interfering with the legitimate claims of others.

[30] I have discussed Mill's "harm principle" and its consequences in greater details in chapter 4.

or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited." Similarly, article 10 of the ECHR (European Convention on Human Rights) protects freedom of speech subject to certain restrictions that the member states could by law deem necessary "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." So, it is evident that even international organizations like the UN and the EU observe the rights of its member states to restrict free speech on some important grounds.

If we look at the legal provisions devised by individual countries to control the harms of free speech, we find a wide range of disparity. At one end of the spectrum stands the US legislation under the First Amendment, that allows strong protection to freedom of speech, and at the other end appear laws devised under the German system, where Article 130 of the *Strafgesetzbuch* (German Criminal Code), adopted in 1960, prohibits attack on *human dignity*, which include: 1) inciting *hatred* against a certain part of the population, 2) inciting to violent or arbitrary acts against such part of the population, or 3) insulting, maliciously ridiculing or defaming such part. Parekh has rightly pointed to the diversity of issues that have prompted legal restrictions in different countries:

> Britain bans abusive, insulting, and threatening speech. Denmark and Canada prohibit speech that is insulting and degrading; and India and Israel ban speech that incites racial and religious hatred and is likely to stir up hostility between groups. In the Netherlands, it is a criminal offence to express publicly views insulting to groups of persons. Australia prohibits speech that offends, insults, humiliates, or intimidates individuals or groups, and some of its states have laws banning racial vilification. Germany goes further, banning speech defining and diminishing hate speech that violates the dignity of an individual, implies that he or she is an inferior being, or maliciously degrades or defames a group.[31]

[31] Bhikhu Parekh, "Is There a Case for Banning Hate Speech?" in *The Content and Context of Hate Speech*, ed. Michael Herz and Peter Molnar (New York: Cambridge University Press, 2012): 37.

Similarly the case laws in different countries have responded to the scope for government regulation, based on the challenges and potential threats that extreme defence of free speech could pose in that society. For example, in the American case, Samuel Walker has argued that the Supreme Court has shown a significant shift in its position from the early 20th century to the 1940s, and then from 1950s to the 1980s. Walker has argued that that this shift could occur because the civil rights movement in the US recognized, that free speech was the only resource available for the powerless and the excluded, and so always stood in its favour, as it served broad social and political needs in the struggle for racial equality.[32] One can definitely locate a shift in the courts position from the early 20th century, when hate crimes of the white supremacist group Ku Klux Klan were widely reported, to the post-Second World War period of ideological opposition to communist and fascist ideologies. A shift in the judiciary's attitude is clearly visible from cases like *Chaplinsky*[33] and *Beauharnais*[34] where it upheld laws against group libel and argued that not all speech is protected by the first amendment, to cases like *Sullivan*[35], *Mosley*[36] and more prominently in the *Skokie*[37] and *R. A. V*[38]. The debate seems to have taken a further turn with the challenge of "campus hate speech," which became prominent from the 1980s onward. This phase is also marked by the rapid expansion of feminist theory, critical race theory and other alternative discourses, all of which attacked mainstream and official speech as inherently oppressive, white-male-dominated discourse and argued for pluralisation and fragmentation of discourse.[39] As the judgements in different cases show, the court has

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32 Samuel Walker, *Hate Speech: The History of an American Controversy* (London: University of Nebraska Press, 1994): 160.

33 Chaplinsky v. New Hampshire, (1942) 315 U.S. 568.

34 Beauharnais v. Illinois, (*1952)* 343 U.S. 250.

35 New York Times Co. v. Sullivan*,* (1964) 376 U.S. 254.

36 Police Dept of Chicago v Mosley, (1972) 408 US 92 96.

37 National Socialist Party of America v. Village of *Skokie*, *(1977)* 432 U.S. 43.

38 R.A.V. v. City of St. Paul*, (1992)* 505 U.S. 377.

39 M. Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," in *The Content and Context of Hate Speech*, ed. Michael Herz and Peter Molnar, 255.

set very high standards for free speech, and its regulation is possible only in exceptional circumstances, even in cases concerned with hate speech. However, at the same time if we look at the cases that appear in the European courts, especially, in the European Court of Human Rights (ECtHR), it appears that the court has upheld the right of the member states to use legal sanction against the claims of free speech in a wide range of cases. For example, in *Otto-Preminger-Institut*[40] the court held the forfeiture and seizure of anti-religious film "Das Liebenskonsil" (Council in Heaven) did not contravene article 10 of ECtHR since it was aimed at protection of religious right of the majority, in that case the Christians of Austria. Similarly in *I.A.*[41], the court held that the case of blasphemous libel of a publisher for printing a fictional work by Abdullah Riza Erguven entitled "Forbidden Verses" in which a character makes disparaging comments about Islam was justified, as the conviction was intended to protect Muslims against offensive attacks on matters regarded as sacred by the community.

These readings of the legal provisions and case laws show that there is no uniformity in the way questions around the scope and limitations to free speech are handled around the world. In this respect, the case of India is similar. In India, though freedom of speech and expression is a guaranteed constitutional right, it in no way has any primacy or prior preference over other rights. The Constituent Assembly Debates (CAD)[42] (as I shall discuss in my third chapter) clearly show the tension between different aspects of rights and the way the constitution-makers tried to balance them along with the possible threats emanating from freedom of speech and expression, by providing certain restrictions under article 19(2). This article, as it stands today, imposes reasonable restrictions "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence." However, India's difference from the western democracies is also clearly visible if we examine major legislations designed to regulate free speech, and try to identify the reasons for

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40 Otto-Preminger-Institut v. Austria, (1994) (13470/87) ECtHR 26.

41 I.A. v Turkey, (2005) Appl. No. 42571/98.

42 Hereafter to be called CAD in this thesis.

prosecution specified in these laws. For example, even if we argue that "incitement to an offence" and concern for "public order," as present in article 19(2), may reflect the debates in west, how do we account for restrictions based on "decency", "morality", or "defamation"? The broad latitude of restrictions to free speech that India allows can further be gauged, from the language used to define the statutory laws. For example, section 153(A) of the IPC, criminalises the promotion of "enmity between different groups on grounds of religion, race, place of birth, residence, language etc," or by engaging in "acts prejudicial to maintenance of harmony." The broad scope of section 153(A) is further buttressed by section 153(B), which prohibits "imputations and assertions prejudicial to national-integration." The section criminalises the use of "words either spoken or written," signs, "or by visible representations or otherwise." Similarly, there are other provisions like:

- Section 295, which prohibits "injuring or defiling [any] place of worship with intent to insult the religion of any class";
- Section 295(A), which prohibits "deliberate and malicious acts, intended to outrage religious feelings or any class by insulting its religion or religious beliefs";
- Section 298, which prohibits "uttering words, etc, with deliberate intent to wound religious feelings";
- Section 505(1), which prohibits "statements conducive to public mischief"; and,
- Section 505(2), which prohibits "statements creating or promoting enmity, hatred or ill-will between classes."

These legal provisions, unlike most European provisions, use terms like "injury", "insult", "malicious act", "outrage feelings", "wound", "promoting enmity", and "ill-will", which have much wider, normative and practical connotation. What these legal provisions, and the historical background from which they emerged, reflect is that the fundamental right to freedom of speech and expression is treated differently in India. Charles Taylor rightly criticizes those scholars who assume there can be any right way to establish free speech through abstract principles, which could then be applied

anywhere, regardless of local conditions. Taylor adduces two reasons in support of his argument: a) any regime of freedom of expression requires some broad consensus. It cannot just be imposed by law, because, if its principles are too distant from mass sensibilities, it will be rendered nugatory by all sorts of extralegal pressures; and b) any regime of free expression has limits which are justified by the possibility of harm inflicted on others…. This is an issue which is sensitive to cultural differences.[43] Though one may disagree with the kind of regulative and restrictive mechanism allowed to be placed in the hands of government in India, one cannot deny that the regulations were included in a particular social and historical context. The complexities of inter-communal relationships, marred by the memory of partition, and the challenges facing the postcolonial Indian state, particularly that of national integration and nation-building, became reasons for such extensive provisions for restricting free speech in India. So as the European nations argued for regulation of hate speech in the context of the Holocaust and later, under the pressure exerted by the "multi-cultural" nature of the European society, and in US in the context of racism and anti-communism, India had its own complex reality to deal with. The impact of context on legal regulation of free speech is very well reflected by Parekh, in his discussion about hate speech. As he puts it:

> Western societies have several mechanisms to cope with hate speech and its consequences, such as an open and competitive economy, a vibrant civil society, a reasonably cohesive and integrated society, a varied media representing a wide spectrum of views, and a plural and self-limiting public culture. They can therefore afford to assign law a relatively limited role…… So far as the developing countries are concerned, the situation could not be more different. Most of them are composed of ethnic, religious, and racial groups with little experience of working together and a long legacy of mistrust, ignorance, misunderstanding, and hostility. Rumours, jokes, inflammatory or ill-conceived remarks by politicians seeking short-term gains, and even reasoned criticisms made in the course of an uninhabited exercise of free speech can arouse deep-seated fear, trigger unrest, and undo years of good work in nation building.[44]

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[43] Charles Taylor, "The Rushdie Controversy," *Public Culture* 2, no. 1 (1989): 118-121.

[44] Parekh, "Is There a Case for Banning Hate Speech?" 55.

Many scholars and legal practitioners have made critical assessments of the nature and scope of the law in India that governs free speech. One line of criticism pertains to the continuance of laws that had colonial roots. It is argued that such laws have lost their relevance in the present era and should therefore be scrapped.[45] This idea echoes the concern that many lawmakers had also raised on the floor of the Constituent Assembly, when the restrictions enshrined under article 19(2) of the constitution was being debated.[46] Another set of scholars highlight how these laws may not prove productive in achieving the goal they were meant to achieve – prevent hate speech, or protect hurt to religious sentiments of the people. There are two primary apprehensions raised by scholars in this regard – the first is with respect to the way in which these laws, rather than preventing hate speech which could hurt sentiments, allow for mobilisation in the name of hurt sentiments[47]; the second apprehension is about the "slippery slope" effect of laws, concerning the misuse of laws by state agencies in promoting or enforcing a legal sanction that might create hurdles for free exercise of right to freedom of speech and expression.[48] These scholars argue about the inefficacy of the Indian statutory laws in dealing with the subject of hate speech, and therefore they question the presence of such laws in India.

Contrary to these views are the arguments of those who believe that given the nature of Indian society, where political power structures favour religious majorities, and where caste and gender inequalities render large numbers of citizens vulnerable and exposed

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45 Girja Kumar, *Censorship in India: With special reference to Satanic Verses* (New Delhi: Har-Anand, 1990); Sohini Ghosh, "The Alchemy of Hate and Hurt," in *Sentiment, Politics, Censorship: The State of Hurt*, ed. Rina Ramdev, S.D. Nambiar and D. Bhattacharya (New Delhi: Sage, 2016): 55-70; Lawrence Liang, "Reasonable Restrictions and Unreasonable Speech," *Sarai Reader* 04 (2004): 434-440, http://archive.sarai.net/ files / original/ e8cc962416f0a1f2da6bc009347fa387 .pdf.

46 This aspect is discussed in greater details in Chapter 3 of this work.

47 Liang, "Reasonable Restrictions"; Asad Ali Ahmed, "Spectre of Macaulay: Blasphemy, The Indian Penal Code, and Pakistan's Postcolonial Predicament," in *Censorship in South Asia: Cultural Regulation from Sedition to Seduction*, ed. Raminder Kaur and William Mazzarella (Bloomington, Indianapolis: Indiana University Press, 2009): 172-205.

48 Liang, "Reasonable Restrictions"; Ratna Kapoor, "Who Draws the Line? Feminist Reflections on Speech and Censorship', *Economic and Political Weekly* 31, no. 16/17 (1996): 20; Sohini Ghosh, "Censorship Myths and Imagined Harms." *Sarai Reader* 04 (2004): 447-454, http://archive.sarai.net/ files/original/755257fc6fa 5744ae93c402cd54bc039.pdf.

to the threat of hate speeches based on their caste, religious or gender identity, the state needs to intervene for their protection. Scholars like A.G. Noorani[49], Rajeev Dhavan[50], Iqbal Ansari[51], and Rajeev Bhargava[52], represent this view and they constantly highlight the importance of "reasonable restrictions" as enshrined in the constitution. However, they are cautious to suggest that the state machinery should understand that, it is the fundamental right of speech and expression that is "sacred" and not the restrictions itself. Reports on riots in India show that most of the instances of communal violence were preceded by altercations often incited by pamphlets, booklets, or other publications or even hate speech targeting the vulnerable religious group of the region, which included threats or vilification of their religious beliefs or practices. Studies such as those by Paul Brass[53] and Steven Wilkinson[54] support such explanations. These facts are used by human rights activists, such as Teesta Setalvad, to argue that hate speech laws are integral to the protection of the plural and secular nature of multi-religious Indian society. In the absence of hate speech laws, Setalvad holds that the instances of hate crimes against minorities could rise.[55]

In this thesis, I do not intend to judge whether the presence of legal provisions against free speech is a good thing or not. I limit my study to understand what the presence of

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49 See, A.G. Noorani, "Films and Free Speech," *Economic and Political Weekly* 43, no. 18 (2008): 11-12; A.G. Noorani, "Free Speech and Provocation," *Economic and Political Weekly* 34, no. 41 (1999): 2898.

50 Dhavan, *Publish and be Damned*.

51 Iqbal Ansari, "Free Speech- Hate Speech: The Taslima Nasreen Case," *Economic and Political Weekly* 43, no. 8 (2008): 15-19.

52 Rajeev Bhargava, "Literature, Censorship and Democracy," in *What is Political Theory and Why do we Need it?* (New Delhi: Oxford University Press, 2012), 239-260.

53 Paul Brass, *The Production of Hindu-Muslim Violence in Contemporary India* (Seattle: University of Washington Press, 2003), 60-116.

54 Steven I. Wilkinson, *Religious Politics and Communal Violence* (Oxford: Oxford University Press, 2005).

55 See, Teesta Setalvad, 'When hate speech and writing infiltrate public discourse segregation and discrimination become the norm and rape and war can always be incited in the name of that hatred', Paper presented at the Expert Workshop for the Asia Pacific organized by the United Nations High Commissioner for Human Rights (OHCHR), July 6-7, 2011, available at http://www.ohchr.org/ Documents/Issues/Expression/ ICCPR/Bangkok/TeestaSetalvad.pdf.

these laws means to the discourse of freedom of speech and expression in India. Therefore I focus on the genesis of these laws – the context in which the laws were devised and the major actors who were involved in their formulation. This shall include a study of the circumstances that led to the formation of the provisions under constitution and the statutory laws, as well as the amendments introduced at later stages. This helps us to shed light on the attitude of the lawmakers towards freedom of speech and expression, both under colonial rule as well as after independence. At the same time, such study also enables us to understand the relationship between law and freedom of speech and expression in the Indian context as imagined by the law makers. I analyse the nature and scope of these laws, but my analysis is guided by the language used to define the laws and the possible interpretations that the courts have provided at different instances, which as I show in my thesis, is significant to the process by which state censorship works in India. It is therefore equally important to analyse the role of the judiciary for this purpose.

As in the case of American and European political systems, the judiciary in India too, plays a prominent role in defining the scope and limits of free speech. Some commentators question the prominence given to the judiciary, based on their analysis of what they claim to be controversial judgments. It is said that "the judiciary is itself not outside the politics of communal hatred."[56] Even if one might agree with this assessment, it is beyond doubt that the judiciary plays an extraordinary role in defining the scope of freedom of speech and expression in the Indian context. Unlike the US judiciary which has largely dealt with the question of "hate speech" by means of "fighting words"[57] and "clear and present danger"[58] doctrines, the Supreme Court in India takes a wider cognizance of the test for "reasonableness" of restrictions imposed by the state machinery, by treating each case differently from the substantive as well as

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[56] Lawrence Liang, "Love Language or Hate Speech," *Tehelka* 9, no. 3, March 3, 2012, http://archive.tehelka .com/story_ main51.asp?filename=hub030312love.asp.

[57] Fighting words can be defined as a word that by their very utterance inflict injury or incites an immediate public order violation. This doctrine became a precedent after *Chaplinsky*, 315 U.S. 568.

[58] This doctrine was established by Justice Holmes in Schneck v. United States, (1919) 249 U.S. 47, to judge if the limits set on free speech were justifiable against the First Amendment.

procedural standpoints.[59] A reference to the case laws in other European countries as well as America becomes important as it has played a significant role in providing a frame of reference for Indian judges – a fact reflected in the judgments, where one can find constant reference to similar cases in America and other democracies. But at the same time, the judges in India have often maintained that the context and nature of their society being different, the principles and positions that the courts in other countries take may not be reproduced in India. For example, free speech scholar Daniel Hantman invokes a comparison between Indian and American Supreme Courts' approach to freedom of expression, and argues that Indian courts shows a higher degree of tolerance for restricting socially offensive and emotionally harmful speech. He concludes that this has been made possible due to the persisting tension present between India's western governing system and indigenous communal social structure.[60]

In India, the judiciary interprets "reasonability" of restrictions to free speech in very broad terms by taking into consideration "intention"[61], based on "content"[62], and "context"[63] of the speech, and in some cases the "threat to public order," where it is expected of the government to prove that, there was some definite threat to the law and order situation[64], and that there was no other lesser alternative available[65]. As I argue in my thesis, the role of the judiciary in free speech cases in India lacks any basis for settled understanding. The rulings are ambiguous and any set precedence is absent. This, I show, proves to be counter effective to the cause of free speech in India as it

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59 The State of Madras v. V. G. Row, (1952) AIR 196 SCR 597.

60 Daniel Hantman, "Shaking Fists and Simmering Craniums: India's Tolerance for Restricting Socially Offensive and Emotionally Harmful Speech," *Indonesian Journal of International and Comparative Law* 1, no. 1 (2014): 73-104.

61 *Ramjilal Modi,* AIR 620; Public Prosecutor v. P. Ramasamy *Nadar*, (1962) Crl. App. No. 125 of 1962.

62 N. Veerabrahaman v. State of Andhra Pradesh, (1959) AIR 1959 AP 572; Nand Kishore Singh v. State of Bihar, (1986) AIR 1986 Pat 98.

63 Virendra v. State of Punjab, (1957) AIR 896; Gopal Vinayak Godse v. Union of India and others, (1971) AIR BOM 56.

64 Ram Manohar Lohia v. State of Bihar, (1966) AIR 740.

65 State of Gujarat v. Mirzapur Moti Kureshi Kassab Janat, (2005) 8 SCC 534,567.

encourages non-state actors to use law and legal process to harass writers and publishers, since there is a constant uncertainty about the position the courts would take in a particular case.

The role of the Indian judiciary in free speech discourse has (until recently) largely been an understudied area. It is in this field that I intend my thesis to make the most important contribution. Most of the literature available on the subject is predominantly about press freedom.[66] Other than this, the subjects of censorship of books, art, films or obscenity find space in journalistic writings and are primarily in context of specific acts of censorship. Works on censorship such as Bhowmik's on film censorship[67], Girja Kumar's on book censorship[68], Brinda Bose's gender and censorship[69], Kaur and Mazzarella's edited volume on censorship in South Asia[70], have all avoided critical engagement with case laws. Though they use judicial pronouncements in their work, one can find only selective use of case laws aimed to buttress their arguments. Recently some serious engagement with the topic can be seen in the works of legal scholars like Rajeev Dhavan, Gautam Bhatia, Siddharth Narrain, and political scientist Pratap Bhanu Mehta. Dhavan's work shows that courts in India, especially higher courts, have tried to provide a strong defence to freedom of speech. However, the legal process is so exhaustive and painful that the process itself becomes a form of punishment.[71] This point has been reiterated by Narrain in his study of hate speech laws in India.[72] However, with reference to case laws, Narrain

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66 See, S. Sorabjee, *Law of Press Censorship in India* (Bombay: N. M. Tripathi, 1976); S. Bhatia, *Freedom of Press: Politico-Legal Aspects of Press Legislation in India* (New Delhi: Rawat Publications).

67 Someswar Bhowmik, *Cinema and Censorship: The Politics of Control in India* (New Delhi: Orient Blackswan, 2009).

68 Kumar, *Censorship in India*; Kumar, *The Book on Trial*.

69 Brinda Bose (ed.), *Gender and Censorship* (New Delhi: Kali for Women, 2006).

70 Kaur and Mazzarella, *Censorship in South Asia*.

71 Dhavan, *Publish and be Damned*, 1.

72 Siddharth Narrain, "The Harm in Hate Speech Laws: Examining the origins of Hate Speech Legislation in India," in Ramdev, Nambiar, and Bhattacharya, *Sentiment, Politics, Censorship*, 39-54.

has highlighted the ambiguities that exist even at the level of Supreme Court judgments, and hence he shows that the judgments even from courts at the highest level are not immune to contradictions, which make the fundamental right to speech and expression more vulnerable in the Indian context.[73] The issue of ambiguity in free speech related judgments is also pointed to by Mehta, who believes that one of the reasons for such ambiguity is the concern for and the tilt of the courts towards communitarian values, especially when a fundamental right such as that of speech is posed in contention with freedom to religion. An approach based on values of individualism, according to Mehta, could help the courts overcome their bias against the right to freedom of speech and expression.[74] Bhatia, in his work, presents a set of contradictory streams that appear as foundational to the judiciary's position on free speech. He argues that the judges have either favoured a "moral-paternalistic vision" or a "liberal-autonomous vision". The "moral-paternalistic vision" holds that since human beings are corruptible, they may not be entrusted with extreme freedoms and it is therefore the duty of the public institutions to prevent any harm to the citizens. The "liberal-autonomous vision", according to Bhatia, is based on the immanent faith on human judgment and choices and any form of interference with that is seen as unwarranted.[75] Where on the one hand, the "moral-paternalistic" attitude limits the scope of free speech, therefore allowing wider interference of the state, on the other hand, the "liberal-autonomous" attitude favours the claims of free speech. Bhatia argues that, based on these approaches, the courts decide the fate of free speech cases. These recent works on the subject have contributed significantly in my project. Such scholarship has helped me to grasp the multiple ways in which the role of judiciary could be viewed. Taking my cue from each of the above mentioned scholarships, I present a detailed study of courts role *vis-a-vis* the claims of religious offence against

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73 Siddharth Narrain, "Hate Speech, Hurt Sentiment and the (Im)Possibility of Free Speech," *Economic and Political Weekly* 51, no. 17 (2016): 119-126.

74 Pratap Bhanu Mehta, "Passion and Constraint: Courts and the Regulation of Religious Meaning," in *Politics and Ethics of the Indian Constitution*, ed. Rajeev Bhargava (New Delhi: Oxford University Press, 2008): 311-338.

75 Gautam Bhatia, *Offend, Shock or Disturb: Free Speech under the Indian Constitution* (New Delhi: Oxford University Press, 2016).

publications. I have shown that a detailed study of the courts' approach towards free speech, as well as the law and legal process that defines the boundaries of free speech, reveal that there are many variables that impact the fate of the case laws. For example, the courts' generous consideration of the public order situation and the emphasis on protecting the secular and plural credentials of Indian society, has prompted moves to limit free speech. Similarly, the ambiguity in the court's decisions, as well as the operative constraints like delay in judgments, has increased the vulnerability of freedom of speech and expression in the Indian context. At such a juncture, the philosophical considerations that scholars like Bhatia impose on the judiciary, might not represent the actual complexity. Mehta's opinion about an individualism based approach might be fruitful, but the judiciary does not actually enjoy that liberty as it is guided by the constitution where freedom of expression is not the only value that needs protection. The courts are under, a lot of pressure to balance this fundamental right with others like freedom of religion and in the process, even if the courts fail the expectations of libertarians who argue for extreme freedom of expression, it is ready to do that. For its justification of curbing free speech, the courts easily invoke article 19(2) of the constitution, which defines the limits to freedom of speech and expression. In my work I have tried to critically engage with all these scholars through the prism of case laws. However, I do not limit this study only to an analysis of case laws. I have also looked at the structural and operative aspects of courts' functioning, which have been overlooked by both Bhatia and Mehta. This helps me to develop a broader understanding about the role of courts in the debates over freedom to expression. For example, my study about the duration of the time taken by the courts in India to pronounce judgments in cases related to publications claimed to be offensive, shows that it usually takes very long for the courts to adjudicate in the matter. This, as I explain in Chapter 5, creates conditions, whereby authors/publishers try to evade legal process, and agree for out-of-court settlement with the complainants, even if it hampers their free exercise of freedom of expression. Further, I have also tried to look at cases, where the government, the non-state actors, and the judiciary interact. This helps me examine the consequences of such interactions, and also understand how courts view the role of non-state actors in censorship, an issue largely overlooked in earlier studies.

3.2. Interventions by Non-state Actors in Censorship and the Role of Courts

Censorship is a form of suppression, whereby speech considered harmful, objectionable, sensitive or inconvenient is controlled. There can be several forms of this control and several agents that might perform this act. Traditionally it was understood to be under the power of some legitimate authority, mostly the state, to decide about censorship but the nature and forms of censorship has changed drastically in recent decades. More recently, censorship has come to be understood as a power relation operating at different nodal points in social relationship. While histories of censorship used to chronicle official legal suppression of speech, Foucault's work invited us to "escape from the limited field of juridical sovereignty and state institutions, and instead base our analysis of power on the study of techniques and tactics of domination."[76] A set of scholars have used the Foucauldian method to develop a framework to view this power relationship which is popularly called "new censorship".[77] These scholars point at the change in the practice of censorship with the growth of new power centres, sometimes visible, at other times imperceptible. So, a range of new vocabularies have entered the discourse like "self-censorship", "market censorship", "social censorship," and others. All these present different notions of censorship based on the difference in the location of power. The assumption is that threats to free speech come from all directions, not just from government. To this extent, censorship has been privatized,

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[76] Robert C. Post, introduction to *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles: Getty Publications, 1998), 1.

[77] Advocates of this new approach include Richard Burt, Sue Curry Jansen and Michel Holquist, among others. See, Richard Burt, introduction to *The Administration of Aesthetics: Censorship, Political Criticism and Public Sphere* (Minnepolis, London: University of Minnesota); Michael Holquist, "Corrupt Originals: The Paradox of Censorship," *PMLA* 109, no. 1 (1994): 14-25; Sue Curry Jansen, *Censorship: The Knot that binds Power and Knowledge* (New York: Oxford University Press, 1991). However, this approach has also received severe criticism from scholars like Beate Muller, and Robert Post. For example, Robert Post criticises the new scholarship on censorship by arguing that it has "flattened distinctions among kinds of power, implicitly equating suppression of speech caused by state legal action with that caused by the market, or by the dominance of a particular discourse, or by the institution of criticism itself." This invariably makes it difficult to formulate a pointed criticism of censorship itself because it gets so difficult to locate the point of origination. See, Robert C. Post, introduction to *Censorship and Silencing*. Also see, Beate Muller, introduction to *Censorship and Cultural Regulation in the Modern Age* (Amsterdam: Editions Rodopi, 2004).

taken out of the hands of the state and located in other sources of power. Simon Lee calls it "the privatization of censorship."[78]

Commentators on censorship in India have primarily focussed on the role of state in the process. Concepts like "market censorship" and "self-censorship" are fairly new entrants into this scholarship. It is not to say that other forms of censorship did not exist in the Indian context, it is just that the field is heavily under-researched. Moreover, the state in India still plays a dominant role as censor. The only other form of censorship that appears prominently in the literature on censorship in India is "social censorship", or what Noorani calls "informal censorship."[79] Some scholars believe that the issue of social censorship has still not acquired centrality in the discourse of free speech, even though it has greater ramifications than the traditional form of censorship practised by the state institutions.[80] It is further argued, that such shift in the character of censorship can be attributed to the growth of Hindu Nationalism in 1980s, which developed a constructed form of cultural explanation and tried to impose it through vandalism and physical censorship.[81] These scholars believe that, in this phase non-state groups began to not only define "harm", and what was "objectionable", but in themselves took the responsibility to censor the speech act by different means. The violence sometimes used by these vigilante groups – like the vandalism of art galleries, burning of books, attacks on artistes and theatre players, and protest demonstrations against authors – can be seen as evidences of this phenomenon.

Though the argument about the changing nature of censorship may be true, its direct relationship to the rise of Hindu fundamentalism in 1980s is, at the very least, questionable. Indeed my own research shows that the forms of mobilization or protest that these commentators highlight, has in fact been a regular phenomenon in India, and has remained a successful strategy, used either to exert pressure on government to

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78 Simon Lee, *The Cost of Free Speech* (London, Boston: Faber and Faber, 1990), 10.

79 A.G. Noorani, "Informal Censorship," *Economic and Political Weekly* 30, no. 40 (1995): 2472.

80 Dhavan, *Publish and be Damned*; Kumar, *The Book on Trial*.

81 This opinion is also supported by authors like Brinda Bose, Sohini Ghosh and Ratna Kapoor, among others.

censor the controversial speech act, or impose a direct form of censorship through threats or violence. The controversy surrounding the books *Living Biographies of Religious Leaders* in 1956 (as discussed in chapter 3), and *Agnipariksha* in 1970 (as discussed in chapter 6), reveal that explicit, or even violent forms of intervention by non-state groups, existed even before 1980s. It further shows that, these form of intervention are used by socio-religious groups across different communities (by Muslims in case of *Living Biographies*), and are not restricted to Hindu nationalists. Therefore, I argue that, the inter-relationship drawn between the role of non-state actors in censorship and the rise of Hindu Nationalism in 1980s is questionable.

Even if one argues that social censorship is not a new phenomenon in India, the important question remains about the traditionally defined role of the state as the legitimate authority to take decisions regarding censorship. Constitutionally, it also raises doubts about who defines restrictions and what constitutes "reasonability" of such restrictions in this context. The situation becomes more complex when we see that the government not only fails to remove such constraints but in many occasions becomes a party to it.[82] The role of the judiciary becomes even more important in this context. First, it acts as a check onto the arbitrary use of power to censor by the government authorities. Second, the courtroom becomes the site where contrasting and competing interpretations of the constitution are advanced by different parties, and judges are expected to decide cases according to law. The position that the courts take has ramifications not only for the way the scope of freedom of speech and expression is legally defined, but also for how free speech is perceived in the popular discourse. One of the important ways in which non-state actors assert their views is through legal channels. We have examples of writs being filed in judiciary requesting the court to direct the government to ban books (as in the case against Doniger's *The Hindus: An Alternative History*). So the position that the courts take vis-a-vis the interpretation of

[82] Murugan's case, as discussed in the beginning of the chapter is an example of this phenomenon. But this is not an isolated case. For example, after some sections among Muslim community protested against Kamal Hasan, a popular actor in South Asia, on the subject of portrayal of Muslims in his movie *Viswaroopam*, the Chief Minister of the Tamil Nadu, Jayalalita, regardless of the fact that the actor had reached court for respite, suggested the author to negotiate and solve the matter "amicably" outside court.

different statutory laws, determines the fate of such cases, and at the same time sets a precedent for future instances when non-state actors use the legal process for the purpose of censorship.[83] For example, soon after Dinanath Batra was able to force the publishers to pulp Doniger's book *The Hindus*, he threatened to file a law suit against Aleph Book Company, publisher of another of Doniger's book, *On Hinduism*, which Batra claimed, offended the religious sensibilities of Hindus.[84] By examining some of these representative cases, my thesis aims to explore some of the complexities that have become central to discussions about freedom of speech and expression in India.

Many scholars on censorship in India have maintained that all forms of intervention by non-state actors – both legal and extra-legal – are unwarranted in a democracy like India as it limits the scope for freedom of expression.[85] These scholars argue that there are examples which show that, even the legal route is used to harass authors/publishers/ artistes, as the legal process itself, is exhausting and costly.[86] Contrary to this opinion, I argue that, we need to differentiate between the legal and extra-legal modes of participation in censorship by the non-state actors. The legal mode of participation – which includes the practise of demonstrating or protesting against a publication, claimed to be religiously offensive, or demanding the state to act against such publications, or filing petitions in the court against such publications – has been considered democratic and legitimate right of the citizens, by the Indian state. Further, the legality and validity of any demand for censorship, through the legal mode of participation, can be scrutinised by the government and the courts. Also, the inconvenience caused by the legal process cannot be attributed to the role of non-state actors. It is the procedural and operative aspects of the legal process, as I have discussed in Chapter 5, which is primarily responsible for the harassment of authors/publishers/artistes, when the non-state actors take a legal route. Contrary to this,

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83 This relationship has been explored in greater details in Chapter 5 of this work.

84 "Doniger's book *On Hinduism* put on hold," *Indian Express*, March 11, 2014.

85 Kapoor, *Who Draws the Line*, 20; Ghosh, *Alchemy of Hate*; Bose, introduction of *Gender and Censorship*.

86 Kapoor, *Who Draws the Line*; Ghosh, *Censorship Myths*, ; Dhavan, *Publish and be Damned*; Kumar, *Censorship in India*.

the extra-legal methods used by non-state actors, which includes use of threats and even violence, is legally prohibited in India.[87] Even in this case, the role of the state is significant, and if it is vigilant and responsive to the claims of freedom of expression, it can protect the right to its free exercise.

4. Methodology and Sources

This dissertation is not intended as a work in political philosophy of freedom of speech and expression. Rather it offers a contribution to the legal history of freedom of speech and expression in Indian context, and also to the field of legal and historical analysis of case laws related to freedom of expression. That is not to say, however, that legal analysis or legal history is devoid of normative concerns. In fact, normative principles provide a significant frame of reference to assess the applicability and validity of law to find solutions to deeper moral concerns. This normative dimension is often reflected in the case laws themselves, where judges repeatedly cite quotations from Milton, Mill, Voltaire, and others, to establish the importance of freedom of speech and expression in a democracy. At the same time, judges have constantly sought to educate citizens about the contextual challenges that laws face in different societies. For example, though constitutional courts all over the world adjudicate freedom of speech cases (and often the courts in India refer extensively to them), the judges in India often reject the applicability of tests or tools used in other countries, by citing differences in the Indian context.[88] Similarly, the "Hicklin test" that the courts applied for obscenity related cases in India earlier was considered to be outdated in 2014 and hence was replaced by another test which was argued to be more suitable to the changing times.[89] Legal history

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87 Both, the statutory laws as well as the courts, are against such practices. For the legal position on teh subject see Chapter 6.

88 An explicit example of this is the rejection of 'clear and present danger rule' as applicable in the American context. This rejection was reiterated in the case of *Shreya Singhal* by Justice Nariman while adjudicating the constitutionality of section 66(A) of IT Act. See, Shreya Singhal v. Union of India, (2012) Writ Petition (Criminal) No. 167 of 2012.

89 Hicklin test was first enunciated by Justice Cockburn in 1868 in America and focuses upon *"the potentiality of the impugned object to deprave and corrupt by immoral influences"* to test obscenity. In India this test was most effectively used by Justice Hidayatullah in, Ranjit Udeshi v. State of Maharashtra, (1965) AIR 881, after which it became the most preferred test to check obscenity.

and legal analysis can register greater sensitivity to such contextual issues, without undermining the importance of normative principles or moral questions.

I draw upon two different methodological approaches in my thesis. First, I have employed methods of historical analysis by historicizing the question of freedom of speech and expression in the Indian context. This historicization is an attempt at sketching a kind of conceptual history of freedom of speech and expression in India. Using the method of historicization helped me, on the one hand, to unpack the genesis of the debates about freedom of expression and its limits in Indian history particularly during the colonial period, and on the other hand, it also provided me with a vantage point to locate the transformations that the idea of free speech underwent after India became independent. I use this approach primarily in Chapter 2 and 3, which focus on the creation and amendment of laws that governed freedom of speech and expression, both during the colonial period, and after Independence. For this, I analyze chronologically, some important moments and incidents in Indian history, which prompted the promulgation of laws governing free speech in India in 19th and 20th century. For example, I examine the *Rangila Rasul* case and the debates that accompanied it, in order to understand the context in which section 295(A) was added to the IPC. This includes a discussion about how the publication of the text *Rangila Rasul*, led to a public controversy about the inefficacy of the available laws, and therefore pressure was exerted on the British authorities by the Indians, to insert new law that could protect the revered religious personalities of different communities, from insults.

I primarily focus on two aspects: a) the context in which the laws governing free speech were created, or amended; and, b) the debates in the Legislative Assembly (for laws formulated during colonial times), and in the Constituent Assembly (during the making of the constitution, as well as in the Parliament (where significant amendments were made to the laws after Independence). Tracing the legal history helped me to be

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Recently, the Supreme Court in, Devidas Ramachandra Tuljapurkar v. State of Maharashtra & Ors., (2015) Criminal Appeal No. 1179 of 2010, held that this test was outdated and in place preferred another test from US constitutional experience called "contemporary community standards test."

sensitive to any shift, in the approach of important players (like Indian leaders) towards freedom of speech and expression and its boundaries, at different moments in history. For example, it helped me to contemplate, how the change in context, especially from a colonial to an independent nation, introduced Indian leaders to new forms of challenges, which had direct influence on the way, the scope of freedom of speech and expression was re-defined after Independence. Locating the historical trajectory through which, debates around free speech developed in India, also helps us to understand, the importance of context in shaping the debates around important concepts, like freedom of expression. For example, the historical trajectory reveals that, the challenges facing Indian society were completely different in nature, than the western democracies. The history of colonialism and the challenges of managing disputes in a multi-religious country, among others, had a significant impact on how the scope and the boundaries of free speech was imagined by the Indian leaders. This is explicitly reflected in the way laws governing free speech are defined in the Indian context, which is also significantly different than other western democracies.

For this research I have used both primary and secondary sources. For the second chapter, as it delves with the colonial context, I have primarily used archival sources including official government files and personal files of Indian leaders as available in the National Archives at Delhi and the India Office Records at the British Library. In the third chapter, which deals with the Constituent Assembly Debates and the post Independence legislative amendments to the statutory and constitutional laws governing Freedom of speech and expression, I draw extensively on the debates as recorded during the Constituent Assembly Meetings and during legislative business in both houses of Indian Parliament. These are available in print form in the Indian Parliament Library and in the NMML (Nehru Memorial Museum and Library, Delhi). Along with this, the newspaper archive of the period available both, in digital archives, and in physical form in the National Archives, enabled me to reconstruct the background for the debates and hence to locate the debates in the political context of the time.

Second, I have used interpretive methodology to study the case laws as well as debates in the Constituent Assembly and the Indian Parliament on the subject of freedom of

speech and expression. Here I take cue from the method of "recovering intentions" as suggested by Skinner.[90] Skinner distinguishes between the question of what the text means and the other about what its author may have meant. He maintains that both these questions though separable, are not separate. Agreeing with Paul Ricoeur, he maintains that the meaning of a text is far more complex than the intention of the author, but recovering what the author may have meant is equally important to understanding the meaning of the text. So he suggests that even if the complete meaning of a text cannot be recovered, the author's intentions which can give us some sense about the meaning of the text can definitely be understood.[91] Further, Skinner maintains that though it might not be entirely fruitful to look for the perlocutionary intentions of an author, the recovery of illocutionary intentions is not only possible but also very important, if we aim to understand the meaning of what the author wrote.[92] For this he suggests: "we should start by elucidating the meaning, and hence the subject matter, of the utterances in which we are interested and then turn to the argumentative context of their occurrence to determine how exactly they connect with, or relate to, other utterances concerned with the same subject matter."[93] In my thesis, Skinner's methodology proves extremely useful in interpreting the intentions of the constitution makers and the lawmakers in Independent India through a reading of the CAD, and the debates later in the Parliament. The recorded debates of the CAD and the Parliament are a rich repository of discussions on various aspects of the Constitution, its scope and limitations.

During the course of these debates, each participant referred to both normative and empirical concerns related to the subjects they discussed, and in the process cited examples and evidences from the experiences of law in other countries, primarily from

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90 Skinner writes, "….whatever an author was doing in writing what he or she wrote must be relevant to interpretation, and thus that among the interpreter's tasks must be the recovery of the author's intentions in writing what he or she wrote." See, Q. Skinner, "Motives, Intentions and interpretation," in *Visions of Politics*, Vol. I (Cambridge: Cambridge University Press, 2010), 101.

91 Ibid., 96-102.

92 See, Q. Skinner, 'Interpretation and the understanding of speech acts', in *Visions of Politics*, 103-27.

93 Ibid., 116.

the US and the UK. At the same time, the legislators also engaged with the views of philosophers and judges of different countries in order to argue for their viewpoint. For example, in case of freedom of expression, many members of the Constituent Assembly like Nehru, Ambedkar, K. T. Shah, K. M. Munshi quote from philosophers like Milton and Mill, and also engage with views of jurists like Justice Blackstone and Justice Holmes. A close reading of these debates, therefore, helps us to understand how these leaders imagined the nature and scope of freedom of expression in India, while being conscious, and at times critical, about the way it was constructed in the debates of western democracies. For example, the makers of Indian constitution were situated in such a position in history where they could neither completely endorse a individualism-based liberal model of free speech regime as in the western democracies like US or UK, nor could they completely reject such views. While considering the form that freedom of expression adopted in different contexts, they settled for generating an India-specific idea of freedom of speech and expression which reflected a selective understanding of liberalism, one that was qualified by deep concerns of maintaining social cohesion and realizing the goal of integrated and sovereign Indian nation.

More importantly, I use Skinner's suggestions to interpret case laws. This method has been used primarily in Chapters 4, 5, and 6. Skinner suggests a very rigorous analysis of texts to derive authorial intentions. However, in case laws, the primary texts available for analysis are the recorded judgments of the courts. The judgments delivered by the court, contribute in the discourse on that subject, where the judges not only make a comparative analysis of case laws in different societies and its implications in those contexts, but also take extensive care regarding precedents including earlier judgments delivered on similar subject, either by the same court or other courts. A close study of these judgments can enlighten us about the perspective of the courts, in relation to their agreements and disagreements on the available understanding of free speech and its boundaries. The arguments made by judges, give a sense about what they were trying to achieve, by accepting or rejecting an earlier interpretation of law. So for example, in the case of *Lalai Singh Yadav*[94], while dealing with the scope of section 95 of the CrPC,

[94] This judgment of this case is reported as, State of Uttar Pradesh vs. Lalai Singh Yadav, (1976) 1977 AIR 202. The case and the judgment have been discussed in greater details in Chapter 4.

Justice V. R. Krishna Iyer approached the question from various dimensions. He held that it was the legitimate right of the state authorities to ban or forfeiture publications that could create disturbances in law and order, and at the same time, he claimed that the American doctrine of "clear and present danger" would not be very helpful in the Indian context considering the volatility of communal relations in Indian society, particularly on issues related to religious offense. Though, the court adjudged that the forfeiture of the publication in question was not legal, as there were technical limitations in the notification, issued in support of the forfeiture by state officials, had technical flaws, the observations of Justice Iyer were significant. The debates and doctrines with which Justice Iyer engaged while writing the judgment, provides a sense about how he was defining the Indian context, and also the place of freedom of expression in it. The observations of Justice Iyer, primarily, his negation of the efficacy of "clear and present danger" doctrine in Indian context, became a guiding reference point for future debates on freedom of expression, and therefore an important intervention was laid by Justice Iyer in the discourse of freedom of speech and expression in India.

Skinner's methodology, therefore I argue, is equally helpful in legal analysis. However, in order to use the methodology more effectively, I concentrated on some analytical questions while interpreting the matter of the case laws. These included questions like: Why do courts in India allow restrictions to freedom of speech and expression and how do they define "reasonability" in this context? What are the factors that judges consider while adjudging a case where a claim of offense to religious sentiments is raised against a publication? What kind of philosophical and legal references do the judges use in order to reach to a conclusion in such cases? How do judges engage with the practise of similar laws in other countries? Similarly, in the case of interpreting the CAD and the Parliament I concentrated on following questions: How did the constitution makers view the idea of freedom of speech and expression especially in relation to the restrictions invoked under article 19(2) of the constitution? What were the events that guided the debates on freedom of speech and expression in the Constituent Assembly while the constitution was being written, and later, in the Parliament when the lawmakers initiated amendments to the statutory laws? How did the circumstantial

contingencies affect the idea of freedom of speech and expression in the Indian context? These questions helped me concentrate on the specific aspects of the debates and case laws that had relevance for my research and further helped me to situate the debates in a proper context whereby it became easier to understand the intentions of the judges and the lawmakers.

The fourth, fifth and sixth chapters deal extensively with the role of courts and for these chapters I have largely depended on case laws both in the Supreme Court as well as High Courts. The analysis in these chapters is driven by an extensive study of thirty two court cases related to contentious books claimed to be religiously offensive during the period 1947-2010. For this I conducted a search on Manupatra Database[95] for the terms "19(1)(a)"; "19 (2)"; "295(A)"; "153(A)"; and "CrPC 95". The reason was that these are the sections of the Constitutional and statutory laws which deal with freedom of speech and expression including the issue of book proscription, book bans and the controversies on the subject of freedom of speech and expression vis-à-vis the claims of religious offense. Following this, I tried to locate the original cases in the various official records, like AIR (All India Reporter); and journals published by Supreme Court and other agencies like Indian Law Institute, at Delhi, like CriJL (Criminal Law Journal), SCC (Supreme Court Case), and SCR (Supreme Court Reporter). The list of includes all the cases from the Supreme Court and High Courts on the subject, which appeared in these records.

I have used case laws in two ways in my thesis: a) for analysing the interpretation of laws in these cases, and examining the reasons that the judges give in holding some form of expression as objectionable; and b) in order to study the procedural and operative dimensions of legal process, like, the time taken for courts to pronounce judgment in each case, the strength of the benches that heard the case, and ways in which the judgment uses different doctrines to test the subject under consideration. The analysis of all the aspects studied, as part of the procedural and operative dimensions of

[95] Manupatra is a digital legal database, which includes all the reported judgments of Supreme Court and High Courts in India, along with Central and State Acts, Central rules, Pending Bills in the Parliament, and Notifications of various Central Ministeries.

legal process, has been presented in form of tables in Chapter 5. For analysing and presenting the interpretation of court judgments, I do not present a chronological order of discussion. This is primarily because I found that the courts do not follow any set precedents in terms of reference, nor do they necessarily respond to the debates of preceding judgment. Further, in defining what constitutes religious offense, and explaining the justifiable limits of freedom of expression, I did not find any major shift in the position of the courts over different periods. If such shifts were visible, it could be better represented through a chronological presentation of case laws. The approach of the judges is largely driven by the subject under consideration, and they choose to reflect and respond to the debates of selective case laws, as presented by the counsels during the course of the court proceedings. So, rather than presenting the study of case laws in a chronological way, I earmark some important questions for enquiry, and analyze the judgments in the light of those questions.

For example, in Chapter 4, which primarily deals with the court's position on the subject of religiously offensive publications, I focus on two primary questions: a) how courts in India define religious offence, in the light of available constitutional and statutory laws. This includes the discussion about what makes a publication "religiously offensive", and therefore, eligible for legal action; b) what according to the courts, is the acceptable justifications for legal intervention by government officials, in the free exercise of the right to freedom of speech and expression? Focussing on these issues helped me, to analyze the court cases rigorously, while emphasizing on the subject which is one of the central concerns in this thesis, i.e. the role of courts in defining the limits of freedom of expression vis-a-vis the claims of religious offence.

In order to support my arguments with evidence in Chapter 4, I have discussed selective court cases in great details. These cases were selected based on their importance, as well as their representative nature. For this, I have primarily focussed on the cases which recur in discussions in the courtrooms and in the written judgments as precedents. For example, in the Supreme Court case of *Ramji Lal Modi*[96], the court

[96] *Ramjilal Modi,* AIR 620.

tested the legal validity of section 295(A) of the IPC, based on its interpretation of article 19(2) of the Constitution. The judgment that the court delivered in the case became a landmark, and is consistently referred by different courts, whenever there is a discussion about section 295(A).[97] In order to present a complete picture of the case and the background conditions, I have also used newspaper archives, to get a sense of the controversy. This includes the archives of primarily, national dailies, but where required, the archives of regional newspapers were also used, as per availability.

I have also used some other case laws for discussions, which might not deal directly with the question of publications claimed to be religiously offensive, but the observations of the courts in those cases, are crucial to analyse the subject under consideration. For example, I refer to cases like *Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*, and *Dr. Ram Manohar Lohia v. State of Bihar and others* to understand how courts define the concept of "public order". Though these cases are not about religiously offensive publications, they are cited widely as the issue of public order is equally relevant for cases that discuss the question of religious offence.

Other than court cases, in Chapter 5 and 6, I also discuss a few other important instances of censorship in the Indian context. These include Wendy Doniger's *The Hindus*, Salman Rushdie's *Satanic Verses*, Tasleema Nareen's *Dwikhandito*, and Acharya Tulsi's *Agniparksha*. The selection of these examples is based on the subjects under discussion in these chapters. For example, Doniger's case illustrates how the role of law and legal process in India produces "public self-censorship", whereby the behaviour of the state institutions force a kind of self-censorship, so that the author/publisher are compelled to submit to the demands of the claimants of religious

[97] In some cases, it is directly referred, like, The State of Mysore v. Henry Rodriigues and Another, (1961) 1962 CriLJ 564; *Ramasami*, 1 MLJ 147; and, Yashwant Venilal Sanghvi v. Sahdevsinh Dilubha Zala, (2006) 3 GLR 1873; among others. At other times, this case forms part of the courts' observations, while it is dealing with other related subject. For example, these discussions can primarily be seen when court tests the validity of section 95 of CrPC, in cases such as *Lalai Singh Yadav*, AIR 202; *Nand Kishore Singh*, AIR 1986 Pat 98.

offense.[98] Similarly, banning of *The Satanic Verses* using Customs Law, reflected two important aspects about the practise of censorship in India: a) how non-state actors can assert pressure on the government, in order to impose their viewpoint; and b) how certain laws in Indian context, place executive decisions on censorship, beyond judicial scrutiny. Both these aspects are significant to understand the process of censorship in India. Further, though Customs Law was widely used by government to ban import of publications it considered objectionable, in the case of ban on *The Satanic Verses*, it was for the first time that the nature and scope of this law came into public discussion. In that way Rushdie's case became an instant reference point.

Acharya Tulsi's *Agnipariksha*, Tasleema Nareen's *Dwikhandito*, represent the phenomenon where the intervention of non-state actors in the process of censorship, undermine the role of courts in the process. Both these cases represent the extremity of this phenomenon. Even after the courts had held that the publications under controversy were harmless, and the state was not justified in acting against the publications, the non-state actors forced the authors to withdraw controversial passages from the book, in case of Nasreen, and the entire book in case of Acharya Tulsi. Therefore, these cases become ideal representatives of the issue under discussion. Further, both these cases were widely reported in the media, and became subjects of intense controversy over the role of non-state actors in the process of censorship, and its meaning for the scope of freedom of expression. I argue that the cases discussed above are representative cases, because they initiated important public debate on different aspects related to censorship, but also because they most effectively highlight the issues that form important subjects under consideration in this thesis, like: how restrictions to freedom of expression is defined in the context of an interface between law, state agencies and the non-state actors. These four cases showcase different layers in the understanding, as well as practises of censorship. As the cases vary across a wide time frame (between Acharya Tulsi's *Agnipariksha* in 1970s to Doniger's *The Hindus* in 2014), I have used similar

[98] I use this concept as developed by Philip Cook and Conrad Heilmann. See, Philip Cook and Conrad Heilmann, "Two Types of Self-Censorship: Public and Private," *Political Studies* 61, no. 1 (2013): 178-196. They differentiate between public and private self-censorship based on who the censors and who the censee were.

sources in all the cases to map them consistently. I have primarily dealt with newspaper archives and secondary writings by legal and political experts, in order to make sense about the issues at stake, and narrate important moments from the cases under consideration.

5. Structure of the Thesis and Chapterization

The thesis is divided into following chapters:

Chapter 1: Introduction

In the introductory chapter I discuss the concept of freedom of speech and expression and the debates surrounding its limitations. Here I concentrate on the legal and constitutional provisions for free speech and its restrictions in International law as well as laws of democratic societies like US, UK, South Africa, among others. This would give a broad understanding about how Indian laws on the subject stand in relation to other democracies when seen in a comparative perspective. The chapter will also discuss the central questions on which the research was based and the methodology followed during the research.

Chapter 2: Freedom of Speech and Expression in Colonial India: The Genesis of an Idea

In this chapter the history of the debate in colonial times is traced in order to understand the making of some of the most important laws that continue to govern freedom of speech and expression. This historical context provides an account of how British and Indian leaders understood the issue of limiting freedom of speech and expression. My central argument in this chapter is that the British authorities employed "selective censorship" in cases of malicious writings on religious subjects and the Indians' response on the subject was similarly ambiguous. A tacit consensus was developed that freedom of expression should be limited by law but there was no clarity about how these limitations should be defined or exercised.

Chapter 3: Freedom of Expression and Religious Vilifications: Decoding the Constitutional and Legal Definition of Limits

This chapter is divided into two parts. In the first part, I revisit the CAD to understand the position of the founding fathers vis-à-vis freedom of speech and expression: it was made a part of fundamental rights, but simultaneously important caveats, in the form of article 19(2) were also placed upon it. I argue that the caveats emerged from a particular context: the nationalists' experience with the British Raj, as well as the threat to public order in the context of partition. In an attempt to rationalize the binary relationship between free speech and restrictions, the Assembly agreed to boundaries that remained vague in language and subjective in interpretation.

In the second part I discuss the amendments introduced to the constitution and other statutory laws. Two constitutional amendments (first, sixteenth), and the amendments to section 295(A), and 153(A) (in 1961 and 1969) are discussed in detail, as they all directly affected the freedom of speech and expression. The central argument I advance in this section is that the constitutional as well as legal provisions for freedom of expression and its 'limits' in fact allowed significant space for the intervention of government. Also, the debates in the Constituent Assembly and the Parliament (during amendments) give us useful clues and indications about the attitude of the Indian lawmakers on the subject. We can see that the threat of religious violence and riots in each case dominated decisions regarding such legislations. While efforts were made to control elements within the news press that were responsible for inciting religious hatred among communities, how such changes might affect freedom of expression at a much broader level tended to be overlooked. For example, the legislations that were passed to control news press were also going to impact authors/publishers of books and other printed materials. But no effort was made to either reason out the broader impact of such laws or to include protections against misuse of such laws.

Chapter 4: Preventing Religious Offence: Law, Courts and "Reasonable" Restrictions to Freedom of Speech and Expression

In this chapter I analyse how the courts in India have treated the claims of religious offence vis-à-vis freedom of speech and expression. I argue that, unlike the popular perception, the courts' position in general has been to restrict freedom of speech and expression if it is found to be offending to the religious sensibilities of any section of the society. By examining various High Court and Supreme Court cases, I show that this position was reflected in the way the courts justified wider latitude for state action and intervention in cases related to contentious publications and its author. On the one hand, the expansive interpretation is adopted in the way courts have criminalized publications for the content or subject-matter as well as the form in which the ideas were expressed, on the other hand, it is also explicit in the court's arguments for expansion of the scope of preventive action by the executive. I also argue that the court's approach to the question of religious offense could be seen based on two important justifications adopted in different cases. Firstly, the courts have shown great sensitivity towards cases where the issue of public order is involved. Judges have maintained that issues of religious offense have a tendency to snowball into religious violence and hence have emphasized the need for being cautious with such publications. Secondly, courts have argued that since it is the duty of the state to protect the secular and plural nature of India society, the government should take immediate steps to prevent any feelings of exclusion or discrimination among different religious communities. Both these concerns have led the courts to uphold several occurrences of state intervention where freedom of speech and expression was stifled. I argue that the position of the court in such cases reflect, on the one hand, a form of legal paternalism, where it guides the citizens about how to speak and express, and on the other hand, a form of legal patronage to state action. The cases used to build this argument have been significant in defining the scope for freedom of speech and expression in India and find repeated citations in other cases regarding freedom of expression.

Chapter 5: Law and Legal Process as Hurdles to Freedom of Speech and Expression

In this chapter I engage with the operative and evaluative aspects of the court. I argue that the courts have failed to provide a robust defence to freedom of speech and expression. In fact, the lacunas largely associated with the functioning of courts in India and the ambiguities reflected in judgments have proved counter-productive to the defenders of free speech. It has not only resulted in creating an atmosphere of uncertainty and fear among authors/publishers but also acted as an encouragement to people demanding censorship based on the pretext of religious offense. The case of Wendy Donigers's *The Hindus* provides a striking example of this dichotomy. I show that the institution of judiciary, which the constitution makers had claimed served as the ultimate defender of civil and fundamental rights of the citizens and especially of freedom of speech and expression, has in fact allowed its curtailment. Though some of the judgments in the courts seem to favour freedom of speech and expression, its general attitude of defining the limits of freedom of expression vis-à-vis public order, or other values like secularism and pluralism, have produced signals which cannot be considered favourable for a free exercise of freedom of expression.

Chapter 6: Role of Non-state Actors in Censorship and the Position of Courts

In this chapter I examine cases related to censorship where the government, the judiciary, and the non-state actors interact. The process through which social forces collide with state power, has often subordinated the role of the courts as defenders of free speech. To highlight this I discuss two types of cases: a) cases where the use of statutory laws like the Customs Act, give an immunity to the decision of the government (For example, I discuss the banning of Salman Rushdie's *Satanic Verses*); and b) cases where the prevailing atmosphere forced the author to censor controversial writing regardless of the fact that the court had found nothing objectionable in the text and hence revoked the official ban on the book (I discuss the fate of Tasleema Nasreen's *Dwikhandito* and Acharya Tulsi's *Agnipariksha*). In each of these cases one can see an active role played by non-state actors, which include socio-religious groups as well as political parties. The main arena of the contestation between the claims of

religious offence and freedom of expression in these cases remained outside the courtroom, I argue. However, the language of law was predominantly used as a way to legitimize for demands of censorship.

Unlike the position taken by many scholars on censorship, who argue that all forms of intervention by non-state actors was problematic, I argue that we need to look into the interventions of non-state actors, by distinguishing their participation through the legal process, and their use of violence and threats, to impose censorship. This distinction helps us to understand that on many occasions, the grievances may be genuine, and that the expression of such grievances, even the protests to attract attention of government officials towards their grievances, may fall well within the democratic rights of citizens. By highlighting the role of non-state actors in censorship, I argue that, it increases the role of courts as protector of freedom of speech and expression in India.

Chapter 7: Conclusion

This chapter shall summarize the entire thesis focusing on major arguments, and highlighting the scope for future research in the area of study.

CHAPTER 2

FREEDOM OF SPEECH AND EXPRESSION IN COLONIAL INDIA: THE GENESIS OF AN IDEA

1. Introduction

The ideas and institutions of colonial modernity were brought to India from outside: that is, by the agents of European, especially British imperialism. This was in sharp contrast to the primarily or largely internal or indigenous processes through which Europe itself had launched its project of enlightenment and modernity.[99] The claim of monopoly and expertise over modernity was used as justification by the colonial powers to fulfil its imperial ambitions. The colonial rule reflected dichotomies at two different levels. Firstly, liberty that was held to be the most sacred and universal value of the enlightenment project was in fact being curtailed through the processes of colonialism and the creation of subject peoples- another product of the same enlightenment project. Further, the same argument of modernity which was being used to enlarge civil liberties in west was being used to deny basic rights to the colonial masses. This contradiction was sharply reflected in the case of freedom of expression. The people who celebrated and claimed freedom of expression and press as sacred in their own societies, became under the garb of imperial rulers ardent opponents in the colonies, restricting both free expression and freedom of press for their own benefits. For many, British India was a contradictory political formation. In Henry Maine's words, it was a "most extraordinary experiment" involving "the virtually despotic government of a dependency by a free people."[100] These dichotomies produced a new context through the interaction of "east"

[99] See, V. R. Mehta and Thomas Pantham, "A Thematic Introduction to Political Ideas in Modern India," chap. 1 in *Political Ideas in Modern India: Thematic Explorations* (New Delhi: Sage, 2006), xxix. The form in which this "colonial modernity" was introduced in India has been discussed by Sudipta Kaviraj, *The Imaginary Institution of India* (New Delhi, Permanent Black: 2010), 15-20.

[100] H. S. Maine, "The effect of observation of India on European thought," The Rede Lecture of 1875, in *Village Communities in the East and West* (London: John Murray, 1876), 233.

and "west" which is clearly reflected in the translation and understanding of freedom of speech and expression in India.

The power relationship operating in colonial India can be deduced, as Guha argues, by deriving a relation between dominance and subordination.[101] The British tried to establish their hegemony by inducing changes in the institutional structures. The introduction of Western education was an important part of this strategy with an aim to produce a group of rationalist intelligentsia which could ensure a relay of ideological justification for their activities.[102] Though the class of new intelligentsia largely remained loyal to this cause, the liberal ideas based on values of rights and liberty encouraged a section of the same intelligentsia to question the rationale of the colonial rule in India. The press became an effective tool to expose and criticize the British. Such interventions frustrated the attempt to generate legitimacy, which meant that the British rule had to extensively depend on coercion as the primary mode of dominance. They responded by enacting several laws to curb the freedom of press. This was just the beginning of a series of censorship laws initiated by the British which also witnessed a parallel struggle for the demand of freedom of speech and expression by the native Indians.

In this chapter, the aim is to understand how the debates over censorship took shape during the colonial times. I focus on two aspects: a) the attitude of British authorities with regard to censorship and freedom of expression; and b) the reception and response to such attitude from the native population. The central concern is to examine how the debates around freedom of expression and communalism interacted to produce a regime of censorship defined by colonial laws. In the first section I discuss the early stages of debates regarding press freedom and censorship using Raja Rammohan Roy's memorial submitted to the Supreme Court, and later to King George IV, as the most representative response from the liberals in India against press censorship. This is

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[101] Ranajit Guha, *Dominance without Hegemony: History and Power in Colonial India* (New Delhi: Oxford University Press, 1977).

[102] Sudipta Kaviraj, *Imaginary Institution*, 61-66.

followed by a discussion about the attitude of British law makers in India, especially Macaulay and James Fitzjames Stephen, with respect to restrictions on speech acts. I argue that the volatile communal context was used as reason to formulate newer laws governing freedom of speech and expression, and it reflected the politics to derive legitimacy by projecting itself as the neutral arbitrator of competing religious interests. This position is also reflected in the making of section 295(A) of the IPC discussed later in the chapter. However, though the British had devised several laws to regulate and restrict freedom of expression, in the communal atmosphere where tracts and pamphlets were being used to vilify and defame the religious beliefs and religiously sacred symbols they used it very selectively, in order to avoid the blame of favouring one community over the other. The next section highlights how the politics of 'competitive communalism' in the 1870s became so vicious that demands for censorship of offensive publications started emerging from among the Indians themselves. This is followed by a detailed discussion about the formation of section 295(A) of the IPC, which is also referred by many as the blasphemy law of India. The politics behind the making of this law reflected all the aspects discussed earlier – it reflected the attitude of the British authorities as well as the concerns of Indian leaders. The formation of this law also showed the emergence of a tacit consensus that freedom of speech and expression could not be left unbridled especially when the same freedom is misused to cause religious offense or incite religious hatred. So the leaders who were otherwise demanding freedom of press to criticize the authorities, in this case came together with the British lawmakers to define the limits of such freedom with respect to religious harm it could cause. This dichotomy is further reflected in the case of banning of *Satyarth Prakash*[103] by the Muslim League Government of Sind in 1944, as I have discussed in the last section of the chapter. This period, and the response of the leaders, were crucial in shaping the nationalist imagination vis-à-vis freedom of expression because these were the very same people who within 3 years were going to take up the job of writing the constitution of Independent India.

[103] A book written in 1875 by Swami Dayanand Saraswati, a renowned religious and social reformer and the founder of Arya Samaj.

2. Press Censorship and its Opposition in Early Nineteenth Century

The formal debate over freedom of speech and expression in India began to take shape from the early 19th century, which according to C. A. Bayly was the period of advent of "constitutional liberalism" in India.[104] This development, according to him, shared some connection with the great expansion of the press and the idea of association across the world, beginning in the 1780s.[105] The first newspaper in India was also started during this period. However, James Augustus Hickey's *Bengal Gazette* or *The Calcutta General Advertiser*, which took off in 1780, was stopped only two years after its inception as its exposure of the private lives of company servants did not go well with the British authorities.[106] In 1799, the idea of press censorship became more explicit and official with the Censorship of Press Act introduced by Lord Wellesley. The Act brought all the newspapers under the government scrutiny before their publication. Later, in 1807, it was extended to cover all kinds of press publications- newspaper, magazine, books and pamphlets. The Act was revoked by Lord Hastings in 1818. However, the abolition was initiated on the terms that the editors would take responsibility to exclude matters likely to affect the authority of government or injurious to the public interest.[107]

During this period, Raja Rammohan Roy arose as the undisputed representative of the Indians in the struggle for freedom of speech and expression. Roy's aim was to build an Indian "public" from the ground up, so that within a generation Indians would begin to share in power and legislative authority.[108] His concern for freedom of speech and expression is reflected in his opposition to arbitrary deportation of editors and formal

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104 C.A. Bayly, *Recovering Liberties: Indian thought in the age of Liberalism and Empire* (New Delhi: Cambridge University Press, 2012), 28-34.

105 Ibid.

106 Reba Chaudhuri, "The Story of the Indian Press," *Economic and Political Weekly* 7, no. 9 (1955), 291.

107 Ibid.

108 See C.A. Bayly, "Rammohan Roy and the Advent of Constitutional Liberalism in India," in *An Intellectual history for India*, ed. Shruti Kapila (New Delhi: Cambridge University Press, 2010), 27.

press censorship. Along with other Indian liberals of his time like D. N. Tagore, G. C. Bonnerjee, etc., Roy wrote a memorial to the Supreme Court against the ordinance initiated by the then acting Governor General John Adam in December 1823, popularly known as Licensing Regulation Act.[109] When the Supreme Court did not pay heed to the request and went on to register the regulation, he pursued the case further and wrote another memorial, this time addressed to King George IV in London.[110]

The memorial makes it explicit that he was not in support of unbridled freedom, nor was he against already existing laws of land that limited such freedom like laws against libel, and others. In fact he argued that if there were objectionable or seditious publications, the judicial system should render a "writer or publisher culpable and amenable to punishment."[111] Further, he also ensured that should the limitation of liberty of press become necessary, in cases such as – a) if it was for sake of "greater security and to preserve the union existing between England and this country," or, b) against seditious attempt to excite hostility with neighbouring or friendly states – the colonial subjects would be perfectly willing to submit to additional penalties to be legally inflicted.[112]

One of the important aspects of the free press in the Indian context that Roy highlighted in the memorial was its role in the religious discourse of the period. The publishing of books and pamphlets helped the Christian missionaries to promote and spread their religious viewpoints. In this context, Roy was concerned by the ideological clash between different religions and by the way the free press was being used by the native religions to defend themselves from the onslaught of English missionaries, through debates and discussions. He wrote:

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109 Under this Act, before printing or publishing any matter, it was made mandatory to get a license from government.

110 For both the documents see, *Raja Ram Mohun Roy: His Life, Writings and Speeches* (Madras: G. A. Natesan, 1925).

111 Ibid., 60.

112 Ibid., 71-72.

> After a body of English missionaries have been labouring for about twenty five years by preaching and distributing publications in the native languages in all parts of Bengal, to bring the prevailing system of religion into disrepute, no alarm whatever prevails, because your Majesty's faithful subjects possess the power of defending their religion by the same means that are employed against it, and many of them have exercised the freedom of the press to combat the writings of English missionaries, and think no other protection necessary to the maintenance of their faith. While the teachers of Christianity use only reason and persuasion to propagate their religion, your majesty's faithful subjects are content to defend theirs by the same weapons.[113]

This according to Roy was a significant contribution of the free press in India which allowed for debates over key tenets of belief and faith in a non-violent and discursive environment. It is evident that Roy and others did not contemplate that in future the press could be used to incite communal violence.[114] Also, the importance of the free press, for them, did not include a deep concern for individual's freedom of speech and expression, nor was it seen as a necessary to offer a philosophical defence of it. If anything, the argument for the free press was teleological and not concerned with the value of free speech as a good-in-itself. It prioritized the benefits a free press could have for society- both for the governors as well as the governed. But Roy's memorial received no response and the Act remained in place till it was abolished by Charles Metcalfe in 1835.

3. British Attitudes towards Free Expression in Colonial India

From the beginnings of press culture in India, the British authorities wanted to ensure that press freedom could not be used to threaten their rule. So, though some freedom was allowed, it was always subjected to conditions that determined its scope. The legislations introduced during this period reflected this approach. In the process, the basic tenets of liberalism were modified to develop a creative logic in support of

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[113] Ibid., 60.

[114] The memorandum, though written primarily by Rammohan Roy was signed by several well known personalities of the time like D. N. Tagore and G. C. Bonnerjee.

imperial control.[115] One of the important figures that contributed in this redefinition was Thomas Macaulay who spearheaded the formulation of the IPC.

3.1. Regulating Free Speech through Law: Indian Penal Code (IPC) and Legal Provisions

In 1833, Thomas Macaulay was appointed as India's First Law Member and head of its first Law Commission. The legal system in India which he inherited was complex and pluralistic. Some British commentators believed that in many respects it was unmanageable as it suffered from what James Fitzjames Stephen would later call "vices of vagueness."[116] The law making process of this period was dominated by the Utilitarians, in particular the followers of Bentham.[117] Macaulay tried to introduce an attitude that has been described as a "fusion of utilitarian clarity and rigour with Burkean pragmatism."[118]

Macaulay believed that the language of the laws should be clear, unequivocal and concise. Certainty and clarity were two aspects of the Benthamite tradition that remained central. He maintained that laws should resonate "uniformity where you can

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[115] The most important advocates of liberalism and free speech like J. S. Mill were also engaged in justifying the control over free speech of the colonial subjects. See U. S. Mehta, *Liberalism and Empire: A study in Nineteenth- Century British Liberal Thought* (Chicago, London: The University of Chicago Press, 1999); Bhikhu Parekh, "The Narrowness of Liberalism from Mill to Rawls," *Times Literary Supplement*, February 25, 1994, 11-13.

[116] The phrase was used by Stephen in a letter to the Earl of Mayo. As quoted in Elizabeth Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law and History Review* 23, no. 3 (2005): 640. Henry Maine also believed that India was "empty of laws" before the British started to legislate. He wrote, "Nobody who has inquired into the matter can doubt that, before the British government began to legislate, India was, regard being to its moral and material needs, a country singularly empty of law." See, H. Maine, "Minute on Codification in India," dated July 17, 1879, at the NAI (National Archives of India, Delhi), Home (Legislative) August 1879, 217-220.

[117] Eric Stokes, *English Utilitarians and India* (Oxford: Clarendon Press, 1959); K. J. K. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge: Cambridge University Press, 1988); Kolsky, "Codification," 631-83.

[118] See Stephen Collini, Donald Winch, and John Burrow, *That Noble science of Politics: A Study in Nineteenth-century Intellectual History* (Cambridge: Cambridge University Press, 1984), 198.

have it; diversity where you must have it; but in all cases certainty."[119] This was necessary in order to "limit the power which the courts of justice possess of putting their own sense on the laws," rendering them uncertain and contradictory.[120] The codification of Penal laws was an attempt in this direction.

Chapter XXII of the IPC, entitled "Of Criminal Intimidation, Insult and Annoyance" is entirely devoted to forms of offensive language. Macaulay introduced various doctrinal innovations in this section to suit the need of the context. For example he expanded the term 'defamation' to cover libels and slander as well.[121] Further, he rejected the notion that a strict division between speech and acts could be made. He argued that offensive and insulting language should be conceived as speech acts and ought to be a subject to criminal jurisprudence.[122] In many ways this idea of "performative" speech was prescient to the contemporary understandings as reflected in Butler[123] and Mackinnon[124]. He proposed that defamatory spoken words should be considered an offense irrespective of whether they actually caused a breach of peace, on the ground that the mental pain they inflict is a sufficient basis for action. The reason for this proposition was also based on his reading of Indian society. He maintained, "There is perhaps no country in which more cruel suffering is inflicted, and more deadly resentment called forth, by injuries which affect only the mental feelings."[125]

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119 See, T. B. Macaulay, *The Complete works of Lord Macaulay*, Albany Edition, ed. by Lady Trevlyn, vol. xi (London: Longmans, Green, and Co., 1898), 578.

120 Ibid., 424.

121 His provision simply states: "whoever, by words either spoken or intended to be read, or by signs, or by visible representations, attempts to cause any imputation concerning any person to be believed in any quarter, knowing that the belief thereof would harm the reputation of that person in that quarter, is said except in the cases (hereinafter mentioned), to defame that person." See, "Of Defamation," in *A Penal Code Prepared by the Indian Law Commissioners* (Calcutta: Bengal Military Orphan Press, 1837), 124.

122 See, "On Offence against the Body," in *Complete works of Lord Macaulay*, 121-123.

123 Judith Butler, *Excitable Speech: A Politics of the Performative* (New York, London: Routledge, 1997).

124 Catherine Mackinnon, *Only Words* (Cambridge, Massachussets: Harvard University Press: 1996), 30-31.

125 As quoted in Ahmed, "Spectre of Macaulay," 130.

He was particularly concerned about religious insults and devoted a whole chapter entitled "On Offence relating to Religion and Caste" (Chapter XV). In the *Notes* he mentions that in contexts such as India's, where the relationship between different religions is very volatile, dangers "can only be averted by a firm adherence to the true principle of toleration."[126] He believed that one of the ways to inculcate such values in society was by including strict laws against violations. So, laws like section 298 were inserted into the IPC.[127] Macaulay introduced some unprecedented interventions in the discourse of free speech in India. For example: a) The "volatile" context of India and the "intolerant" public culture were used as reasons to legally limit the scope of free speech; b) it made space for prosecution against "mental injury" or "feeling of offence"; and c) at least indirectly, it made religions immune to any criticism or questioning, thereby generating a sense of autonomy which had potentials to promote orthodoxy. He argued that even if the contents of a religion may be wrong, the pain which "insults give to the professors of that religion is real."[128] This, as I will show, completely changed the nature of debate about free speech in India, and the burden of legal limitations guided the discourse since then.

The legal experts of the time like John Dawson Mayne and Sir Lawrence Peel were very critical of Macaulay's approach. They believed that making wounded sentiments a cause for action was a recipe for disaster and it should only be subject to sanction when it led a public disorder.[129] Another person who criticized such approach was James Fitzjames Stephen. Though Stephen lauded the nature of the codes and its success, he was particularly suspicious of the scope of provisions like section 298.[130] Stephen

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126 See, "Notes J," in *Penal Code Prepared*, 49.

127 Section 298 in original IPC is present as section 282 in the Report in *Penal Code Prepared*, 71. It rendered everyone liable to a year's imprisonment who, "with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person.

128 See, "Notes J," 49.

129 J. D. Mayne, *Commentaries on Indian Penal Code* (Madras: J. Higgenbotham, 1862); Lawrence Peel, *Observations on the Indian Penal Code* (Calcutta: Military Orphan Press, 1848).

130 J. F. Stephen, *A History of Criminal Law of England*, vol. III (London: Macmillan and Co., 1883), 322.

thought that such laws would end the possibility of convincing any person that his religious beliefs were untrue as it was impossible "to convince anyone that he is in error upon religious subject without causing him great pain if he really believes in his creed, and the act of addressing cogent and earnest arguments to him on the subject must of necessity involve a deliberate intention of wounding his feelings."[131] Though he had firm faith in the intentions of the law makers and he believed that in the hands of the English magistrates, the law would be interpreted to apply only to wanton insults, he remained suspicious that in future if the power came into the hands of Hindu or Muslim government and judges, it would cause havoc as it was too easy to make accusations on religious subject.[132]

Stephen, however, was convinced about the need for strong laws and a proactive state to maintain peace and order against ever-present threats of inter-communal conflict, "threats that were integral to the nature of the communities the British governed in India."[133] His understanding of the Indian context became the basis of his criticism of John Stuart Mill's *On Liberty* expressed by Stephen in his seminal *Liberty, Equality, Fraternity*.[134] If one compares the attitudes of Stephen and Mill towards imperial policy in India, though there were great overlaps, it also exhibited a significant difference. Stephen's advocacy for coercion was a universal and fundamental aspect of his political thought unlike Mill, who considered it apt only for societies who were still in early stages of civilization.[135] As far as Stephen's views about liberty as a value was concerned, he believed that whether liberty was good or bad would depend on the particular context, time, place and circumstances. In certain cases, he believed, the

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131 Ibid., 312-3.

132 Ibid.

133 See, T. John O'Dowd, "Pilate's Paramount Duty: Constitutional Reasonableness and the restriction of Freedom of Expression and Assembly," in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (ed.), *Comparative Constitutionalism in South Asia* (New Delhi: Oxford University Press, 2013), 271.

134 This is also reflected from the fact that Stephen started to work on the articles during his voyage back home from India. L. Stephen, *Life of Sir James Fitzjames Stephen*, 2nd ed. (London: Smith, Elder& Co., 1895).

135 Mill, *On Liberty*, 10-11.

curtailment of liberty was pertinent for the larger benefit of the society and he cited the example of British coercion in India.[136] He held that coercion was essential to the British efforts to direct moral and religious changes in the Indian society in order to civilize it.[137]

Stephen's attitude towards the state's role in freedom of speech and expression also becomes evident when he questioned Mill's assumption that compulsion was justifiable till the time "when mankind have become capable of being improved by free and equal discussion."[138] He believed that in absence of the heavy hand of the state, no society can fruitfully value its liberties, and he therefore insisted that compulsion was a necessary component of any transformation and it could never be completely replaced by discussion in any society at any time.[139] Stephen's engagement with Mill had particular relevance for India as he had been Law Member of the government of India and had introduced measures to control the press, which Indian liberals regarded as authoritarian.[140] Most significant among his contributions was the Special Act No. XXVII of 1870, which inserted section 124(A) in the IPC, and which was at par with the sedition law in England.

The period between Macaulay as Law Commissioner and Stephen as law member of the council of the Viceroy (1838-1869) witnessed important shifts in the approach of the British administration- both in terms of attitude and policy imperatives. The revolt of 1857 and the transfer of powers from the East India Company to the Crown in London marked an important moment in this shift. The earlier emphasis on the universalist project of civilization based on the assumption that non-western societies were politically dysfunctional was replaced by an aim to understand the logic of native

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136 J.F. Stephen, *Liberty, Equality and Fraternity*, ed. R. J. White (Cambridge: Cambridge University Press, 1967), 183.

137 Ibid.

138 Mill, *On Liberty*, 10-11.

139 Stephen, *Liberty, Equality and Fraternity,* 70.

140 Bayly, *Recovering Liberties*, 11.

society. There seemed to have appeared a consensus in the post-mutiny context to "curtail the transformative ambition implied in the civilizing mission and reconstitute the imperial order on a more conservative basis, in line ith the "traditional" imperatives of native society."[141] According to Low, this initiated in India a more authoritarian insistence on efficiency and stability as the watchwords of imperial policy, and also reversal of liberal efforts at civilizing and creative reform in favour of protecting and conserving native society.[142] This approach was manifest when the religious causes of the revolt became evident and Queen Victoria's Proclamation made the principle of non-interference into native religious beliefs and customs the cornerstone of the post-mutiny imperial policy. The proclamation said:

> We declare it to be our royal will and pleasure that none be in anywise favoured, none molested or disquieted, by reason of their religious faith or observances, but that all shall alike enjoy the equal and impartial protection of the law; and we do strictly charge to enjoin all those who may be in authority under us that they abstain from all interference with the religious belief or worship of any of our subjects on pain of our highest displeasure.[143]

The most important representative of this shift was Henry Maine, who advocated the idea of "indirect rule"[144] based on his own study of the Indian society. Significant change in the understanding about law- its utility, its goal, and more importantly its scope- can also be seen as a direct product of such shift. Though Warren Hastings had back in 1772, introduced the colonial distinction between private and public laws where "public" applied to property and commerce, and personal law pertained to the "private"

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[141] See, Karuna Mantena, *Alibis of Empire: Henry Maine and the ends of Liberal Imperialism* (Princeton, Oxford: Princeton University Press, 2009), 5.

[142] D. A. Low, *Lion Rampant: Essays in the study of British Imperialism* (London: Routledge, 1973), 39-82.

[143] C. H. Philips, H. L. Singh, and B. N. Pandey, ed., *The Evolution of India and Pakistan, 1858 and 1947: Select Documents* (London: Oxford University Press, 1962), 11.

[144] Mantena, *Alibis of Empire*. "Indirect rule" was basically the rule through native institutions. Scholars like Maine argued that there was fundamental difference between the native societies and the British. Based on this argument Maine urged that the aim of British rule should be to use the internal coherence of native institutions rather than its dissolution. Indirect rule became the foundational principle of late imperial philosophy in Asia and Africa.

realm of women, family, religion and tradition but such classifications got a new definition and significance during this period. It made way for two different spheres of law based on the socio-cultural understanding of the Indian context. On the one hand, there was the British-administered universal law in the public sphere, and on the other hand, a separate sphere was left for the administration of Hindu and Muslim personal law. As Thomas Metcalf has noted, "The legal system of colonial India thus accommodated both, the assimilative ideals of liberalism, which found a home in the codes of procedure, and insistence upon Indian difference in a personal law defined by membership in a religious community."[145] It can be argued that, in the context, this was an effective strategy for a colonial power in order to manage its firm control over the administrative aspects of the society, and still maintain a certain level of legitimacy. But such bifurcation also had capacity to sanction a higher degree of autonomy to religious groups and making their internal system more closed. Non-interference in religious matters could also establish a freedom to profess and popularize ones religion, which could later be used to criticize and attack other faiths and belief systems.

3.2. British Raj and "Selective Censorship"

Just after the revolts of 1857, the English language press, largely owned by members of the European community, came down heavily upon the authorities for being too soft and indecisive in punishing the rebels. Lord Canning was at the centre of the wrath and he reacted by announcing gag orders against the press that remained in force for around a year. A decade later in 1867, an Act for the Regulation of Printing Presses and Newspapers was passed to replace the Metcalfe Act, 1835. This act later came to be known as "The Press and Registration of Books Act." After several modifications and amendments in 1890, 1914, 1952 and 1953, this formed a part of the formal law in post-independent India. However, the biggest and most strategic threat to the idea of free press came in 1878 in the form of Vernacular Press Act enacted to give better control over newspapers published in Indian languages. It appeared during the Second Anglo-Afghan War (1878-1880) in order to prevent the vernacular press from expressing

[145] Thomas Metcalf, *Ideologies of the Raj* (Cambridge: Cambridge University Press, 1994), 38.

criticism of British policies. It was only four years later in 1882 that Lord Ripon repealed the act. One significant feature of the Vernacular Press Act was that it made an explicit distinction between the English language press and the vernacular press.[146] The distinction prescribed, was a product of two long term developments- on the one hand, public opinion in India was largely being defined by the state as the opinions of the "non-official" European community, which was mostly represented by the English speaking press; on the other hand, the vernacular press was held responsible not only for supporting developments that led up to 1857 but also for engaging in statements in the years after. For example, Ashley Eden, the Bengal governor defended English speaking press by "non-official Europeans" and argued that it be kept outside the impact of Vernacular Press Act. He said:

> On the whole the English press of India, whether conducted by Europeans or natives, bears evidence of being influenced by a proper sense of responsibility and by a general desire to discuss public events in a moderate and responsible spirit. There is no occasion to subject that press to restraint, and therefore, naturally enough, it is exempted. It would be a sign of great weakness on the part of government to bring it within the scope of this measure merely to meet a possible charge of partiality.[147]

The nationalist movement after 1885 gave a new impetus to the development of the press in India; in fact the press played a very significant role in the movements that followed. By the 1890s, when the issues of sedition became even more prominent, the government geared for new laws. Most significant was the amendment of section 124(A) of the IPC which was restructured in 1898 to include "hatred" and "contempt" along with "disaffection towards the government" as being worthy of prosecution, thereby still further limiting the space for criticism of the administration. These amendments were also warranted because several judicial arguments during sedition trials, including Tilak's, had raised questions about the validity and the scope of the

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[146] Anil Seal, *The Emergence of Indian Nationalism: Competition and Collaboration in the Late Nineteenth century* (London: Cambridge University Press, 1968), 143.

[147] As quoted in, C.E. Buckland, *Bengal under the Lieutenant Governors: Being a Narrative of the Principal Events and Public Measures During Their Periods of Office*, *from 1854-1898*, vol. 2 (New Delhi: Deep, 1976), 716-717.

impugned law.[148] The period of the 1880s and 1890s was also marked by communal violence between Hindus and Muslims in several parts of the country. So, when the amendment was being discussed in the Legislative Assembly, it was proposed that promotion of religious enmity should also be included as an offence against the state under section 124(A).[149] However, after more deliberations, the Select Committee recommended the inclusion of a separate section within the IPC to deal with such cases. This led to the formation of section 153(A) which punished anyone who with words, either spoken or written, promoted or attempted to promote feeling of enmity or ill-will between different classes of subjects, based on religion, race or other factors.[150]

Each important event in local or international politics that had the potential to engage and mobilize public opinion against the British administration was greeted with heavy censorship of the press in India. Though even otherwise the press in India was never completely free, special tools were used during crisis period. So, the Press Act of 1910 and the Defence of India Act 1939 were promulgated against the background of the two World Wars respectively. Similarly, the Press Emergency Act during the Salt Satyagraha, in 1931, and the gag orders during the 1942 Quit India Movement to suppress any news related to Congress activities were all product of reactions to particular events/challenges. The understanding of "crisis" was therefore very political and instrumental. For example, when the Cow Protection Movement peaked and took violent forms in 1893, the vernacular press in the hands of both communities – Hindus and Muslims – played an important role in sowing distrust and enmity – yet on this occasion, the government did not respond to the situation with a sense of urgency to prevent communal clashes. The communication between Lord Lansdowne and the Earl of Kimberley, in 1893, shows that the authorities were well aware how the communal

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148 Donough discusses a number of such trials that hinted at a revision of the laws. Walter Russell Donough, *A Treatise on the Law of Sedition and Cognate offences in British India* (Calcutta: Thackel Spink & Co., 1911), 42-59.

149 In the English law the provision for enmity between classes was included in the section dealing with offences against the state.

150 Donough, *A Treatise*, 60-70.

frenzy was spreading so fast all across the country. On a question about "why… disturbances are becoming more frequent than in past years", Lansdowne responded:

> One of the causes to which this is due [is] in our opinion, beyond all doubt, the greater frequency of communication and the interchange of news by post and telegraph between different parts of the country.... This rapid dissemination of news and increasing activity of controversy, carried on through the Press, by public meetings, and by the addresses of itinerant preachers, is in some respects a new feature in Indian life, and is one which is likely to grow and add considerably to the difficulties of administration.[151]

Further he also gives a detailed account of how it was happening:

> In addition to the inflammatory harangues delivered to meetings of Hindus, [wandering ascetics] have distributed throughout the country pictures of the cow, of a kind calculated to appeal strongly to the religious sentiment of the people. One of them, for instance, depicts a cow in the act of being slaughtered by three Muhammadan butchers, and is headed 'the present state'. Another exhibits a cow, in every part of whose body groups of Hindu deities and holy persons are shown, being assailed by a monster with a drawn sword entitled the 'KaliYug' but which has been largely understood as typifying the Muhammadan community.[152]

Though the administration had such precise details, very little was done to prevent such circulations in different parts of the country. Even when some kind of censorship was imposed to prevent communal tensions, it was always on the pretext of appeals from local officers, who in most cases were natives. This prevented the British authorities from taking direct responsibility of such acts, and in many cases it led to further uproar as it was assumed that the presiding officer was supporting the cause of his own religious brethren in an indirect way. The case of Munshi Inderman of Moradabad in 1879 illustrates how the spread of print was sharpening existing cleavages and exposing new kinds of social tensions. Inderman, who was a follower/member of the Arya

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[151] Lord Lansdowne, et al., memo, December 27, 1893, *India Office Library/Records* London (Henceforth IOL/R), L/P & J/6/365, file 84, 4.

[152] Ibid.

Samaj, had been writing and publishing extensively against Islam and practices of the Muslim community. The Muslim groups, through their press had been continuously urging the district administration to take steps to prevent such offensive publications, but in vain.[153] Later the magistrate imposed a fine on Inderman and ordered destruction of all the copies of the objectionable books he had published. It was found that the magistrate's orders were based on evidences provided by the Deputy Collector, who happened to be a Muslim. This incident was given a communal colour and popularized to demonstrate that now Muslims in public offices were practising "oppression and tyranny upon the Hindus."[154] The Lahore Hindi weekly *Mittra Vilas* regretted that a "distinguished disciple" of Dayanada Saraswati should be treated so severely when many offensive Christian Missionary publications went unpunished.[155] Attempt was made to mobilize public opinion against both enemies simultaneously- the colonial state as well as the Muslims. In the context of the Arya Samaj movement, this strategy helped further polarisation.

N. G. Barrier has noted that the government barred any title strongly critical of western civilization or Christianity.[156] Further, the British authorities were also very strict against any publication against the government and left no stone unturned to charge the offenders under the laws of sedition. The courtrooms, in case of writings against the administration, were only used as signifiers of government's faith in legal system and its inherent respect for freedom of press, but in reality the government used all the possibilities at hand to punish such offenders. Robert Darnton notes that the government would freely construe "feelings of enmity as 'disaffection' and 'disaffection' as 'sedition,' translating freely from one idiom to another as the need

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153 *Lauh-i-Mahfuz*, Moradabad, August 29, 1879, Selections, L/R/5/56, IOL/R, 698.

154 *Samaya Vindo*, November 1, 1876, L/R/5/53, IOL/R, 627.

155 *Mittra Vilas*, Lahore, August 2, 1880, 536, as quoted in Ayesha Jalal, *Self and Sovereignty: Individual and Community in South Asian Islam since 1850* (London, New York: Routledge, 2000), 82.

156 N.G. Barrier, *Banned: Controversial Literature and Political control in British India, 1907-47* (Missouri: University of Missouri Press, 1974), 63. Barrier has noted that the government strictly barred titles strongly critical of western civilization or Christianity, but as we have seen the same was not true about authorities' reactions towards issues dealing with Hindu, Muslim or Sikh faiths.

arose" in order to ensure that the guilty could not escape the web of law.[157] However, in the case of religious vilification and insult among Hindus and Muslims, even after being very well aware of the propaganda, the colonial rulers took very calculated steps, exhibiting "selective censorship."[158]

It is evident from the above discussions that on the one hand the British authorities were not averse to the idea of framing new laws to control, what they held to be, misuse of freedom of speech and expression. However, they were selective in the use of these laws, especially when it involved the subject of religion, as on the one hand they wanted to project their non-interference on religious matters of the colonial subjects, and on the other hand they feared that if they acted against members of one community, they would be blamed of favouring the other. So, unlike the political subjects, the government acted in the controversies over religion very selectively considering all the risks and benefits involved.

In the post-mutiny period, there were also major socio-political changes within the internal structure of Indian society. In politics, a significant development was the formation of the Indian National Congress in 1885, which later led the nationalist response to British colonial rule. Similarly, in the field of religion, this phase saw a wide range of experimental explorations initiated by reformers and revivalists. There were reformers who were using liberal vocabularies to challenge the conservatives.[159] Contrarily, it also gave rise to sections of orthodox fundamentalists within each religion, who opposed any kind of attempts to revive or reform. Such conservatives sought to guard the inner citadel of their religions against any form of external

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[157] Robert Darnton, "Literary Surveillance in the British Raj: The Contradictions of Liberal Imperialism," *Book History* 4 (2001), 167-68; also see Robert Darnton, "Book Production in British India, 1850-1900," *Book History*, 5 (2002), 239-62.

[158] Darnton demonstrated that the British had developed very strict literary surveillance on the publications in India and if anything was found to be against their liking it was deterred and repressed, but such urgency was never visible in issues related to religious "insults" and "offence". Darnton, *Literary Surveillance*.

[159] For example, Bayly has shown the selective appropriation of Mill's ideas of liberty and free expression by the liberals in India to counter the orthodox within the society. Bayly, *Recovering Liberties*, 11.

intervention or interrogations. The period also witnessed the rise of new forms of communal consciousness which by the 1880s and 1890s became an all-India phenomenon.[160] For example as Christophe Jaffrelot notes, this was when "Hindu nationalism," was constructed as an ideology and derived from the socio-religious movements initiated by high-caste Hindus, such as the Arya Samaj.[161] The printing press became new site in the process of cultural self-definition, and the realm in which nineteenth-century communalism developed. The early nationalists like Rammohan Roy, who argued that freedom of press was important for a non-violent clash of religious ideologies, had not contemplated that the same freedom would be used in future to incite violence in the name of religion. It was obvious, therefore, that the attitude of Indians of this period towards freedom of speech and expression was different than that of Roy.

4. The Indian Nationalists' Position on the Question of Freedom of Expression

In the previous section, I discussed the attitude of the British colonial authorities and law-makers on the subject of freedom of expression in India. In the following part, I examine the Indian nationalists' position on the subject, particularly with reference to the publications claimed to be offensive to religious sensibilities of the people.

4.1. Communal Consciousness during 1870s and the Role of Freedom of Speech and Expression

It has been argued that in India, two ideologies – nationalism and communalism – had simultaneous and parallel growth trajectories.[162] The British policy of non-interference

[160] Sumit Sarkar, *Modern India* (Delhi: Macmillan, 1983), 79-81; Bipan Chandra, "Communalism and the State: Some issues in India," *Social Scientist* 18, no. 6-7 (1990), 38-47.

[161] Chrstophe Jaffrelot, *The Hindu Nationalist Movement and Indian Politics* (Delhi: Penguin, 1999), 11-12.

[162] This has been widely discussed by scholars like Sumit Sarkar, Bipan Chandra and Christophe Jaffrelot among others.

in the internal matters of religion further allowed a space for cultivation of communal ideologies. Sandra Freitag has convincingly shown how public arena activities like religious ceremonies among the Hindu and Muslim groups helped in consolidating communal consciousness and also became the breeding ground for violent clashes as witnessed during language controversies over Hindi-Urdu, or the Cow Protection Movement.[163] The same movements also produced local leaders who carried the baton of the nationalist response to colonial rule.

Partha Chatterjee has argued that, in the wake of colonial modernity, the "spiritual" or "inner" domain of culture, such as language, or religion, or the elements of personal and family life, was central to nationalists, and the "more nationalism engaged in its contest with the colonial power in the outer domain of politics the more it insisted in displaying the marks of 'essential' cultural difference so as to keep out the colonizer from that inner domain of national life and to proclaim its sovereignty over it."[164] So, on the one hand, the nationalists fought relentlessly to eradicate the "colonial difference" in the outer domain, on the other hand they struggled to protect their inner/spiritual domain thereby retaining its difference. In this way Chatterjee responds to the claims of Benedict Anderson and Edward Said, who suggested that the colonized confronted their domination, and, imagined their nationalism through the discourses made available by the west.[165] In his work, Chatterjee explored one of the ways in which the active and creative process of self-fashioning happens. But as Ayesha Jalal and Neeladri Bhattacharya, among others, have demonstrated, Chatterjee's assumptions seem to be based on his study of Bengal's middle class "Hindu" society.[166] In their respective

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163 Sandria B. Freitag, *Collective Action and Community: Public Arenas and the Emergence of Communalism in North India* (Berkeley, Oxford: University of California Press, 1989).

164 See, Partha Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993), 26.

165 Benedict Anderson, *Imagined Communities: Reflections on the origin and spread of Nationalism* (London: Verso, 1983); Edward Said, *Orientalism* (London: Routledge and Kegan Paul, 1978).

166 Jalal has criticized the exclusion of Muslim dimension in Chatterjee's work. See, Jalal, *Self and Sovereignty*, 155, 263; Neeladri Bhattacharya, "Notes towards a conception of the Colonial Public," in *Civil Society, Public Sphere and Citizenship: Dialogues and Perceptions*, ed. Rajeev Bhargava and Helmut Reifeld (New Delhi: Sage, 2005), 130-56.

works, these scholars have shown us that there were alternative strategies which were utilized by different sections of population to counter the threat of cultural invasion.[167]

Furthermore, the categories used by Chatterjee's (of "inner" and "outer" sphere), does not seem to engage with the fact that though the "inner" domain of the colonized was different from the colonizer, it was not homogeneous. The insistence of essential difference between the "inner" spheres raised possibilities for multiplicity of subjectivities which consolidated in different forms of available spaces. Hence the forms of consciousness found in this "inner" domain took multiple forms, motivated by different interests variously – religion, caste, language among others. Even within religious consciousness, there were several strands/layers- some dominated by the orthodox sections and the other by the revivalists and reformists. The use of modern statistical tools like census and mapping by the British further added to this process of consolidation. So, even if it was a strategy by the nationalist elites to counter the impact of imperialism in their "inner" or "spiritual" domain, in fact it often made way for further disintegration and increasing differences among themselves.

Also, the "private" and "public" spheres often intermingled in multiple ways. So, there were situations where components of public sphere interacted with the private and vice versa, and such interactions had capacity to reconstitute and redefine the other sphere. Consider for example the sphere of religion. According to Chatterjee, it would form a part of the "inner" or "spiritual" domain and this sphere was guarded by freedom of belief and faith. Similarly, freedom of speech and expression was something of "public" or "outer" domain as it was situated in the realm of law, and there was constant demand to grant such equal rights as enjoyed by the European inhabitants. If the "inner" and "outer" sphere existed as autonomous, how do we understand the phenomenon wherein such freedom was also used by different socio-religious groups to not only profess and popularize one's own religion but in the process vilify other beliefs and encourage

[167] In this context Jalal talks about the process of identity formation among Muslims and the way they had to negotiate their space in the nationalist discourse which was overwhelmly dominated by Hindu majoritarianism. Bhattacharya discusses about the constant interaction between the "private" and the "public" sphere (especially between religion and law) through which the colonial subject defined itself.

conversion? The role of vernacular press, tracts and pamphlets published in the period are evidence of such strategy. In a way, it can be argued that the freedom in "external" domain was being used to impact belief and faith, which constituted the "inner" domain. This form of interaction between private and public sphere also became a problem for the British administrators as they were not sure whether to intrude in certain domains. So, though the realm of the communal press remained embedded in the structure of colonial rules, it was relatively autonomous of the direct patronage of the colonial state.[168]

The communal consciousness that occurred under the effect of print during this period did not give rise to a "public sphere" as understood by Habermas in European context, but rather made the public space itself a site of multiple contestations and differences.[169] Debates implicitly and explicitly defined themselves against opponents, both internal and external. The "lay leaders"[170] played a prominent role who utilized the new techniques of journalism, public preaching and debates, tracts and book writing to promote and profess their ideology. This process also included the invocation of 'history' to define and distinguish different communities.[171]

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168 David Gilmartin, "Partition, Pakistan, and South Asian History: In Search of a Narrative," *The Journal of Asian Studies* 57, no. 4 (1998), 1075.

169 J. Habermas, *The Structural Transformation of the Public Sphere: An inquiry into a category of Bourgeois Society*, trans. Thomas Burger (Cambridge: Polity, 1992).

170 For such leaders see, Barbara Daly Metcalf, "Imagining Community: Polemical Debates in Colonial India," in *Religious Controversy in British India: Dialogues in South Asian Languages*, ed. Kenneth W. Jones (New York: State University of New York Press, 1992), 229-240. These were the new leaders who became experts in religious tradition, though they did not receive traditional teachings and training like the pundits or ulemas. They became more popular due to their use of modern techniques like print in professing and popularizing religion. An example of such leaders was Arya Samaj founder Swami Dayanand Saraswati.

171 It was based on this recognition that Gandhi, in his attempt to bring different communities together rejected the idea of historicization of past as it could lead to divisive and self defeating project for Indian nationalism. He prioritized "civilizational consciousness" over "historical consciousness." "….I believe in the saying that, a nation is happy that has no history," he maintained. See R. Iyer, ed., *The Moral and Political Writings of Mahatma Gandhi*, vol. 1 (New Delhi: Oxford University Press, 1986), 187.

Initially the printing press was used to expose the role of Christian missionaries.[172] But soon these same critical tools were directed by religious groups against each other exposing the fissures at various levels in the religious organization of Indian society. The opposition in this politics was constituted through an imagination of the "other," which changed according to the context of the clashes. So for example, in Punjab when the activities of the Arya Samaj became prominent, it was challenged by the growth of two different streams- the Sanatanis from within the Hindus, and the Singh Sabhas from the Sikhs. However, when the Cow Protection Movement became popular, the natural "other" was found in the Muslims, and on many occasions, one could see tacit understanding among the Arya Samajists, the Sanatanis and the members of Sikh Sabhas to fight against the common enemy, in this case the Muslims.[173]

Though the literate population was still very small, one did not need to be a literate to be aware of such struggles, which often were fuelled by rumours that were transmitted by the spoken word.[174] The contents of newspapers and pamphlets were also disseminated through word of mouth at bazaars and local fairs to rouse communitarian emotions.[175] Various newspapers and pamphlets of this period, from all sides, also voiced their resentment and questioned the colonial government's proclaimed policy of impartiality in the domain of religion. Some of the newspapers urged the government to ban all publications intended to inflame religious passions, but in vain. They equally opposed the virus of conversion that was infecting social peace and urged the state to

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[172] See, *Lauh-i-Mahfuz*, Moradabad, September 14, 1874, Selections, L/R/5/52, IOL, 484. *Lauh-i-Mehfuz*, an Urdu journal, exposed that instead of using the mission funds for supporting the poor, the money was being wasted on the "publication of books written with no other object than to expose, to ridicule and contempt the Hindus and Mussalman religion."

[173] Metcalf, "Imagining Community". Also see, N. G. Barrier, "Vernacular Publishing and Sikh Public Life in the Punjab, 1880-1910," in *Religious Controversy*, ed. Jones, 200-228. The common enemy appeared in the form of Muslims because beef formed an important part of their diet and the same was prohibited in both Hindu as well as Sikh religious traditions which considered Cow to be sacred.

[174] The role of 'rumours' has been widely discussed by various scholars. See, Ranajit Guha, "Tansmission," and C. A. Bayly, "The Indian Ecumene: An Indigenous Public Sphere", in *The Indian Public Sphere: Readings in Media History*, ed. Arvind Rajagopal (New Delhi: Oxford University Press, 2009).

[175] Jalal, *Self and Sovereignty*, 83.

take steps in this regard.[176] The demand for censorship had started to emerge from among the Indians and it was mainly based on the logic to prevent the misuse of the freedom of press and publication to vilify and denigrate religious symbols and personage which led to the incitement of communal hatred among different religious communities. However, such demands were largely overlooked by the British authorities.

By the beginning of twentieth century, clashing communitarian narratives, ostensibly emanating from the "private" domain, flowed in unrestrained form into a public arena of informal politics.[177] Many of the nationalists during this period were also deeply religious and often the political use of religious categories blurred the line between nationalism and communalism.[178] This process had two-way repercussions. On one side the creative energy generated by such consciousness was used in the service of nationalism. For example, Tilak used Ganesh Puja as a public event to facilitate community participation and build a new grassroot unity between Brahmins and non-brahmins which contributed significantly in the nationalist project especially in western India.[179] At the same time, such communal consciousness also inflamed fundamental differences and gave rise to new forms of inter-community conflicts that often took shape of violent riots. As Barbara Metcalf has noted, unlike European experience, where national loyalty dominated, in the colonial areas communal divisions were decisive. In India, according to her, this happened due to two significant developments. Firstly; "representation" and "communalism" were linked. The British had created a "form of government structured on representation, in which leaders to be effective had

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176 Nizam-l-Akhbar, 27 August 1876, Selections, L/R/5/53, IOL, 471.

177 Jalal, *Self and Sovereignty*, 86. Freitag discusses in her work how public arena became sites of new forms of communal consciousness that contributed both in the project of nationalism as well as communal self-definition. See, Freitag, *Collective Action*.

178 Barbara D. Metcalf and Thomas R. Metcalf, *A Concise History of Modern India* (New York: Cambridge University Press, 2012), 150.

179 Metcalf and Metcalf, *A Concise History*, 150. Also see, Reminder Kaur, *Performative Politics and the Cultures of Hinduism: Public Uses of Religion in Western India (London: Anthem Press, 2003).*

to claim to speak for the interests of communities."[180] This meant that it was not individuals but communities defined by religious identities which engaged with the colonial state. This led to, as Freitag has also shown, politicization of religious identities.[181] Secondly, Metcalf also points out that "the colonial appropriation of public and civic institutions encouraged a kind of retreat to domestic and religious space as sites where cultural values could be reworked and renewed."[182] In this process, religious vocabulary attained the role of legitimate expression against the colonial rule. Not only this, even when spaces within civic and public institutions were later created for representation of Indian interests, these were so limited in scope that the issues of religion dominated the debates within these spaces. As Jaffrelot has shown, party leaders appealing to the voters tended to resort to arguments drawn from the religious repertoire. For example, in Allahabad, the electoral rivalry between Motilal Nehru and Madan Mohan Malviya during 1920s revolved around the question of "who was a better Hindu," and was dominated by the issues of beef eating, organizing Ram Lila procession, and so on.[183] This suggests how electoral mobilization, even when it involved such avowedly secular leaders as Motilal Nehru, tended to be assimilated into debates defined by communal consciousness during this period.

The practise of surveillance and control on different forms of expression by the British authorities also contributed to the process communal consciousness. It led to a new tendency among the nationalists to use religious idioms in order to articulate their political aspirations.[184] As Freiteg has maintained, because the "British viewed 'political' activities as discrete from 'religious' or cultural ones," such attempts were

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180 Metcalf, "Imagining Community," 231.

181 Sandria B. Freitag, "Contesting in Public: Colonial Legacies and Contemporary Communalism," in *Contesting the Nation: Religion, Community and the Politics of Democracy in India*, ed. David Ludden (Philadelphia: University of Pennsylvania Press, 1996), 211-234.

182 Metcalf, "Imagining Community," 231.

183 Christophe Jaffrelot, *Religion, Caste and Politics in India* (Delhi: Primus Books, 2010), 350-353.

184 Christopher Pinney, "Iatrogenic Religion and Politics," in *Censorship in South Asia*, ed. Kaur and Mazzarella, 29. Pinney considers this phenomenon in Indian politics as 'Iatrogenesis' i.e. illness that comes about as a direct result of the physician's intervention.

less susceptible to strict censorship.[185] This gave an alternative way to convey the same idea in a covert way. However the use of religious aspects in national consciousness also opened the dangers of misinterpretations and communal polarization as most of these new experiments used references from Hindu mythologies and tried to portray the superiority of Hindu race.

Take for example, the religious idioms used in plays written by Indians in late nineteenth century. In 1876, the government passed the Dramatic Performances Act to "prohibit dramatic performances" that were "seditious or obscene, or otherwise prejudicial to the public interests," "likely to excite feelings of disaffection to the government established by law in British India," or "likely to deprave and corrupt persons present at the performance."[186] The immediate reason for such legislation was the popularity and impact in Bengal of plays like Dinnabandhu Mitra's *Nil Darpan* (Indigo Mirror, 1860), Dakshina Charan Chattopadhayay's *Chakar Darpan* (Tea Planter's Mirror, 1875), Upendra Nath Das's *Surendra-Binodini* (1875), *Ganjananda and the Prince* (1876), and *Police of Pig and Sheep* (1876). Through these performances, the playwright not only explicitly showcased the atrocities of the government, but also appealed for unity to overthrow of the Raj. However under strict censorship initiated by the new law, the writers had to change the plots and characters. So the plays were now based on mythologies and the British characters, which were earlier at the centre of criticism, were replaced by the anglicized Indian character carved by imperial rule.[187] This antagonized the new middle class intelligentsia, who along with some from the Brahmin sections had even earlier objected to the plays on grounds of obscenity, misrepresentation of women subjects and even to the stage performances by women. Further, being based on Hindu mythologies, these plays also lacked appeal to the Muslims: indeed, if anything, the call to Hindu pride put Muslims off. There is

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185 Freitag, *Collective Action*, 212.

186 See, Nandi Bhatia, "Censorship, Social Reform, and Mythological Drama in Colonial India," in *Literature and Film in South Asia*, ed. Diana Dimitrova (New York: Palgrave Macmillan, 2010), 191.

187 Claire Pamment, "*The Police of Pig and Sheep*: Representations of the White Sahib and the Construction of Theatre Censorship in Colonial India," *South Asian Popular Culture* 7, no. 3 (2009), 233-245.

evidence that some of these plays were being used with multiple purposes- on the one hand to expose the British and the other to counter the Muslims claims, especially during Cow Protection Movement and the Hindi-Urdu controversy.[188]

The examples cited above indicate the way that religious symbols were used to speak simultaneously the language of communalism and nationalism. But such symbolism often contained communal overtones, and in the backdrop of multiple moments of religious violence and a culture of vilification of the other religion, the religious differences became more prominent. The situation worsened in the 1920s and with extreme political polarization of religious identities government had to come up with new regulations, in the form of 295(A) which followed the famous *Rangila Rasul* (The Merry Prophet) case in 1927. The most significant aspect of this legislation, however, was that the demand for a law to curtail freedom of expression had emanated from Indians themselves and was passed by the Central Legislature which contained a reasonable number of Indian representatives. Though such demands were not new, in the charged political climate, it took a completely new dimension.

4.2. The *Rangila Rasul* Controversy and the Making of Section 295(A)

The *Rangila Rasul* controversy was shaped and propelled in a particular context of 1920s Punjab. The Non-cooperation-Khilafat phase of Indian politics (1919-1921)[189] represented an unprecedented scale of collaboration between the two largest religious communities of India– the Hindus and the Muslims. However by 1922, after a sudden call off of the movement by Gandhiji following the mass violence at Chauri Chaura, things began to change. The void created by the nationalistic politics was overtaken by competing religious sentiments. This was further fuelled by the *Shudhi* (purification) and *Sangathan* (organization) movement launched by the Arya Samajists in North

[188] Christopher R. King, "Images of Virtue and Vice: The Hindi-Urdu controversy in two Nineteenth-century Hindi Plays," in *Religious Controversy*, Jones, 123-150.

[189] The Non-cooperation movement was started in 1919 under the leadership of Gandhiji as a political strategy to resist the British through non-violent means and included boycott of British goods as well as offices, schools, courts, etc. Gandhiji was able to integrate it with the Khilafat movement, started by the Muslim leaders against the British and in support of the Caliphate in Turkey.

India. This propaganda was equally and strongly reciprocated by the Muslims in North India. The printing press again became a significant means for propaganda setting and very soon the reports of communal clashes replaced the news about nationalist movement as headlines of most major dailies. It turned into a bitter war of tracts and pamphlets which not only involved criticism of each other's faith but went as far as to vilify prominent figures of the other religion.[190] It was in this context that the pamphlet *Rangila Rasul* first appeared.

The tract was published and distributed by Raj Pal[191], an Arya Samaj polemicist, and it was aimed to denigrate the image of Prophet Mohammad by primarily mocking at his marriages and sex life. The publication appeared in response to another Urdu tract entitled *Unisveen Sadi ka Maharishi* (The Great Sage of the Nineteenth century), penned by a Muslim fanatic to counter the criticism and misrepresentation of the Prophet and Islam in *Satyarth Prakash*, the most reverend book of the Arya Samajists.[192] When the demand for the banning of the tracts *Unisveen Sadi ka Maharishi* was raised, the government rejected it citing the absence of "any general public feeling," "lack of any public motive" and no formal complaint unlike *Rangila Rasul* which "attracted immediate attention," and received "wide publicity and was condemned by certain Hindu as well as Muhammadan papers."[193] Consequently, Raj Pal was arrested under section 153(A) of the IPC. Though Raj Pal was convicted and sentenced by the lower courts, he was eventually acquitted by the Lahore High Court.[194]

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190 This, however, was not a new episode in Indian politics; similar rivalry was also seen during the Cow Protection Movement and Hindi-Urdu Controversy during late Nineteenth century.

191 The real author of the tract remains unknown. However, some scholars have claimed that it was Pandit Chamupati, a popular Arya Samajist. G.R. Thursby, *Hindu-Muslim Relations in British India* (Leiden: E. J. Brill, 1975), 40; Kumar, *The Book on Trial*, 50.

192 Kumar, *The Book on Trial*, 50.

193 See, Punjab Legislative Council, *Official Report*, (8 pt. A, 1927), as quoted in, ibid., 51.

194 Main source of the case and judgments- POLITICAL/1927/File 132/I, NAI (National Archives of India). Judgment of the final appeal also published as Raj Pal vs King Emperor, (1927) 14 AIR 590 (Lahore).

4.2.1. *The Case in the Lahore High Court*

The final appeal in the case was directed to the High Court at Lahore, where Justice Dalip Singh heard it, and handed down the judgment on May 4, 1927.[195] After extensive examination of the evidences and contents of the pamphlet, he concluded that the pamphlet was "undoubtedly…… a scurrilous satire on the founder of the Muslim religion…." In very strong words, he maintained that it was a ridiculous piece of writing, liable to, "arouse the contempt of all decent persons of whatever community." However, he insisted that he could not find anything that showed "it was meant to attack the Mohammedan religion as such or to hold up Mohammedans as objects worthy of enmity and hatred." So, he very 'reluctantly' acquitted the petitioner as he believed that the subject in question – malicious satire on the personal life of a religious teacher was outside the purview of section 153(A). He further suggested that if such writings were to be convicted, there was a need for passage of a law to amend the code "by which the publication of pamphlets published with the intention of wounding the religious feelings of any person or of insulting the religion of any person might be made criminal." But because he had to base his judgment in the case upon existing law, he ordered acquittal of the appellant.

The judgement received polarized reactions. It was proclaimed as the victory of Hindu religion by the Arya Samjists. On the other hand protest meetings were held by Muslims all over India, the one in Lahore being attended by around ten thousand Muslims. It was held that the court had failed in protecting the honour of the Prophet. This caused a serious law and order crisis in Punjab. Discussing the situation, Punjab governor Hailey commented:

> There was really a very serious danger of disorder, for an attack on the Prophet was a concrete offence against Islam that stung them to the quick, and they could not bear the thought that Hindus could repeat it with impunity.[196]

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[195] All the references to the case are from *Raj Pal,* AIR 590 (Lahore) and until stated the source remains the same.

[196] Hailey to Vincent, August 11, 1927, in *Hailey MSS* (Eur. C. 152), IOL/R.

On June 11, due to the rising fear for the law and order situation, Hailey moved beyond the set protocol and met a Muslim deputation.[197] He admitted to them that the judgment had left the government "much concerned." He said that he sympathized with those Muslims who felt "justifiably offended" by the pamphlet, and if required, the government would also seek amendment of the law in order to extend its application as suggested by Justice Dalip Singh. Though the liberal Muslims were convinced by Hailey's promises, according to the popular press reports, these voices were silenced by the strong feeling of betrayal and sense of victimhood felt by the agitated popular Muslim response.[198]

In Punjab, a demand for the resignation of Justice Dalip Singh and reversal of the judgment delivered by him was growing. A very radical opinion was expressed under the title "Resign" in Muslim Outlook of June 14, 1927, in which both – the judgment in Rangila Rasul case and Justice Dalip Singh – were abusively criticised. It included grave allegations against impartiality, justice and integrity of Justice Singh.[199] The demand for his resignation was further echoed by other newspapers. Responding to the situation, government arrested D.S. Bukhari, the editor of the daily and its printer Nur-ul-haq on the charges of contempt of court.[200]

The situation worsened with these arrests. Though Bukhari and Nur-ul-haq were punished under the charges of contempt of court, it was widely perceived differently in connection with the *Rangila Rasul* case. The general feeling among the Muslims was that the government had been vigilant and interested in punishing for the offense of contempt of court but was very casual on the issue of the contempt of their Prophet. The sense of anger was rooted in what was seen as a case of bias towards Hindus and

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197 This incident was widely publicized in the press. See, "Deputation to the Governor," *Tribune*, June 14, 1927. Also see Hailey's letter to the Home Department on June 23, 1927, in POLITICAL, 1927, 132.

198 Mohammad Iqbal was shouted down by an agitated crowd at Lahore on June 9, 1927. "Muslims climb down," *Tribune*, June 10, 1927.

199 Barrier, *Banned*, p. 100. The article 'Resign' published in *Muslim Outlook* also tried to make sense of the judgment in the light of the religious identity of Dalip Singh, who was a Christian. See, "Alleged Contempt of Court," *Times of India*, June 17, 1927.

200 "Clear Contempt of Court: Lahore Editor to Jail," *The Times of India*, June 22, 1927; "Lahore Editor Jailed: 'In Perfect Good Faith'," *Times of India*, June 23, 1927.

victimization of the Muslims. The news and the interpretations of the cases spread rapidly all over the country and the press reported reactions in the form of protest meetings, *hartals* (strikes) and Hindu boycott from different regions.[201]

The community antagonism was at its peak and the government was under pressure to restore the faith of protesting Muslims in the justice system. Within a few months, in another similar case, involving Devi Sharan Sharma, who published a similar tract entitled *Sair-i-Dozakh* (Passage to Hell) in *Risala Vartman*, the publisher was held guilty and punished. In this case the judges argued against the logic of Dalip Singh and held that any kind of "promotion of feeling of hatred" in any form was prohibited. Justice Broadway stated that "any criticism of a religious leader, whether dead or alive, falls within the ambit of section 153(A) of IPC."[202] The importance the government attached to this particular case can be gleaned from the fact that Justice Broadway, then on vacation, was especially asked to return to Punjab for the court hearing in the hope that he would reverse the earlier decision.[203]

Broadway's judgment delivered what the government was expecting. But it could do nothing to improve the law and order situation in the country. The harsh punishment pronounced in the case was enough to alienate the Hindus especially in United Province and elsewhere. It was argued that in each case of religious vilification it was Hindus who were prosecuted, and no action was initiated against Muslim authors who wrote similar tracts against Hindu deities. It was further held that the harsh punishment delivered in the *Vartman* case was only because of the hysteria created by Muslims after the *Rangila Rasul* case and the government had buckled under their pressure. Mass meetings were organized all over the United Provinces to condemn and protest against the attitude of Muslims and of government officials.[204]

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[201] The issue was also raised in the Assembly during Question Hour as reported in *Times of India*, August 19, 1927.

[202] *Devi Sharan Sharma and another vs King Emperor*, (1927) 14 AIR 594 (Lahore).

[203] Telegram, Hailey to Broadway, 6 July 1927, *Hailey MSS* Eur. E 200, IOL/R, London.

[204] "Hartals in UP Towns: Hindus Agitated: Aftermath of Vartman Judgment," *Times of India*, August 10, 1927.

4.2.2. *The Bill in the Legislature*

Though the *Vartman* case went as desired by the government, it was thought that uncertainty should be avoided. There was a looming fear of a judgment like *Rangila Rasul* coming up in future, especially, with the kind of uncertainty it had generated vis-à-vis section 153(A). The doubt over such judicial issues needed to be clarified and the only way of doing it was by introducing a revision of the law. It was also believed to be helpful in winning back the lost confidence and good will among the Muslims.[205] Unlike the popular Muslim demand for legislation particularly against such vilification of the Prophet, Hailey recommended drafting of a general section which could prohibit attack upon any sacred symbol of all religions. Hailey believed that a general law of this nature could find support both among the Muslims and the Hindus who had been equally vocal in their criticism when the matter came to discussion in the Punjab Legislative Council.[206] The decision to legislate the "Religious Insult Bill" to amend the required sections of IPC was approved by the Viceroy and the bill was put on table for discussion in the August session of the Central Legislative Assembly.

From the time of introduction of the Bill, to its way through the Select Committee and its final passage, there were several dissenting voices. There were several grounds on which the bill was criticized. Most of the dissenters felt that the legislation was being pushed through hurriedly. B. P. Naidu called it a "panicky legislation" and along with others reiterated the request for a wide circulation of the Bill and that response be sought from all sections whose interests were at stake.[207] Some members also charged the government of appeasement by acting so hastily on the demands raised by a set of

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[205] For reference see, POLITICAL, 1927, 132.

[206] "Hailey's letter to the Home Department," August 12, 1927, in POLITICAL, 1927, 132.

[207] B. P. Naidu, *The Legislative Assembly Debates*, vol. 14, September 16, 1927, 4478. All volumes of *The Legislative Assembly Debates* are available at the NAI. All the citation regarding the debate follows from same source so until mentioned the reference remains same and only column number will be mentioned with name of speakers.

Muslims in North India.[208] Amar Nath Dutt termed it as the "favourite wife policy."[209] A large section of the dissenters also believed that there already existed enough number of such laws and if the government truly wanted to maintain peace and order in society, it did not need an additional law.

However, the most serious questions were raised about the scope of the Bill – about its aims, the fear of misuse and its failure to address the real issues. Though it was recognized that the bill that appeared after the Select Committee stage was much better than what was initially proposed, it did not end all worries. There was a general feeling among dissenters that the bill would not be able to achieve its aims as it did nothing to address the real problem – the causes of Hindu-Muslim tension – since the scurrilous writings were only a product of such tension.[210]

Significantly, there was another issue that received shared concerns from most members across religious and other affiliations. Lajpat Rai, Jinnah, Kunzru, Madan Mohan Malviya were all in support of legitimate criticism of religion or religious reform, especially if made in works of historical importance.[211] Largely it was a concern that the freedom of speech and expression should not be restrained to such an extent that it lost its meaning and true value. Though most of these members were worried about the fate of freedom of expression, the presence of contingent situations forced them to compromise. Freedom of speech and expression in the colonial context, after all, was just a desired claim and not a legal or fundamental right. The law makers considered it more important to counter the temporary threat that it was having on public order and tranquillity. There was also a suggestion in the form of amendment that the law be made applicable only for a limited duration and this was widely supported by the likes

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208 K. C. Roy, 4468. Roy held that the demand had only come from "a handful of men in the Punjab, thoughtful perhaps, patriotic perhaps, but really, the inner working came from a set of men who are responsible for the communal disturbances in north India."

209 Amar Nath Dutt, 4484-6.

210 M. K. Acharya, 3433-6; Thakur Das Bhargava, 3951-2; Roy, 4467-8.

211 Lajpat Rai, 3930-1; M. A. Jinnah, 3932-3; Kunzru, 3941; M. M. Malviya, 3948.

of Lajpat Rai and S. Iyengar, but it lost by a close margin.[212] Section 295(A) as finally adopted said:

> Whoever with deliberate and malicious intention of outraging the religious feelings of any class of His Majesty's subjects, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious belief of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[213]

The case further reflected what I have earlier referred as an attitude to use law for "selective censorship." The government did not ban the initial pamphlets like *Unisveen Sadi ka Maharishi* on the pretext that 'no serious threat was visible," whereas it was evident that *Rangila Rasul* was written in reaction of those tracts. If government would have acted earlier, it is possible that the incumbent situation could be avoided. Such inaction encouraged deviants like Raj Pal and raised several issues about the intentions of the government which was also reflected in the debates of the Assembly.[214] At the same time, it can be seen as a conscious and calculated move to assert the capacity of the state to act as a neutral arbitrator of "supposedly endemic and inevitable religious conflicts."[215] In this regard, one should not overlook the fact that section 295(A) was structured in the form of a law for public order and aimed at preventing vilification of religious belief and personalities of all sections. At least in this sense it was projected as a "secular law," thereby also upholding its promise of neutrality on religious matters.[216] So, without direct intervention on religious matters, the British could claim to have developed a law that protected the interests of all religious communities.

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212 The Amendments that were tabled are mentioned in *The Legislative Assembly Debates*, vol. 14, September 16, 1927, 4502-84.

213 *The Gazette of India*, September 24, 1927.

214 Dr. Belvi, 4469-70. He had raised this issue in the Assembly.

215 Ahmed, "Spectre of Macaulay," 173.

216 See, Julia Stephens, "The Politics of Muslim Rage: Secular Law and Religious Sentiment in Late Colonial India," *History Workshop Journal* 77, no. 1 (2014), 47. Stephens has also developed this point arguing that the case reflects an inextricable relationship between "religious sentiments, colonial politics and secular laws."

But how does one understand the role in such law-making of the native Indian representatives in the legislature? Neeti Nair has argued that in the context of "competitive communalism," this moment should be seen as a case of "legislative pragmatism" where leaders from opposition parties came together to stop wanton attacks on religious figures and create an atmosphere for dialogue between the two communities.[217] A close analysis of the Assembly Debate suggests us that this analysis is not entirely correct. Firstly, as discussed earlier, the primary reason cited by most of the members who were against the bill was the fear of political misuse and increase in the latitude of space for executive action. Secondly, the proceedings of the Assembly also reflected sharp divisions on religious lines. It would not be entirely correct to claim, as Neeti Nair does, that the leaders rose above their loyalties and affiliations.[218] In contrast, they seem to hold to strongly religious line of arguments.[219] Most of the Muslim legislators were in favour of the bill and among those who voted against the bill, most were Hindus.[220] The charges levelled by several Hindu members that the bill was an extension of Muslim appeasement policy of government, has already been discussed. In fact, many of those Hindu members who supported the bill did so only because they believed that a prohibition and check on scurrilous writings would be equally beneficial for all religious denominations. Thirdly, though the concern for freedom of expression was raised, it was not centrally addressed. The fear of the bill's impact on freedom of expression largely remained confined in the arguments of professional pressmen who feared that such law would directly impact their lives. At all other times when the concern was raised, about its impact on historical research or religious reforms, it was never seriously dealt and no remedy was therefore suggested.

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[217] Neeti Nair, "Beyond the 'Communal' 1920s: the Problem of Intention, Legislative Pragmatism, and the Making of Section 295A of the Indian Penal Code", *Indian Economic and Social History Review* 50, no. 3 (2013), 329.

[218] See, "Abstract" of Nair, "Beyond the 'Communal'," 317.

[219] There were attempts to derive the idea of tolerance from religious scriptures like Koran, Gita and others. There were also attempts to pass the buck on the other community and blame for starting the problems. See, Abdul Haye, 3928; Acharya, 3433–3436; Mohammad Shah Nawaz, 3443–3444; Malviya, 3448; Bhargava, 3451–3452.

[220] None of the Muslim members voted against the bill. List of who voted "for" and "against" the bill is available in POLITICAL, File No. 132/27, 1927, 26.

It was not surprising that the claim about the bill's impact on freedom of speech and expression was easily overshadowed by the concern for emergent communal situation and thereby the need to empower the state to maintain public order and tranquillity. It is for this reason that a "consensus," as claimed by Nair, could be reached. But considering the broader silence on the subject of freedom of speech and expression, which was going to be directly affected by the new law, and a strong insistence on the religious line of argument, reflected that the law makers were engaged in building a response to a situation of emergency, where law was seen as a means to protect the emotional subjects from hurt. I doubt that this approach can be called "legislative pragmatism," as Nair has claimed. If anything, the role of the Indian representatives in the Assembly reflects a sense of urgency and short-sightedness as, in an attempt to provide instant protection to religious sensibilities from hurt, they failed to contemplate the long term repercussion that such a law could have on the basic rights of people.[221] The most significant aspect of the debates in the Assembly was that the native leaders engaged in a process of deliberation on a law that was going to govern their lives and impact their basic liberties in a fundamental way. However, a consensus was implicit in the process of deliberation that some rational limits had to be drawn in order to check religiously offensive speech acts. This aspect dominated the proceedings of the legislature and the importance rendered to such law in overcoming topical issues marred the possibility of an assessment about its probable implications.

4.3. The Nationalist Discourse and the Dichotomy over Freedom of Expression

Situations like the Rangila Rasul controversy exposed the lack of clarity, among the nationalists, on the question of freedom of speech and expression. So, on the one hand they were demanding greater freedom to criticize the government[222], and on the other hand they were not very sure how to respond when such freedom was used for vilification of religious

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[221] Most of the votes in favour of the bill were "reluctant" and only responding to the "emergency situation." Nair, "Beyond the 'Communal'," 331.

[222] All the major documents brought out by the nationalists reiterated this demand like *Constitution of India Bill* (1895), *Commonwealth of India Bill* (1925), *Nehru Report* (1928), The *Karachi Resolution* of Congress (1931) on *Fundamental Rights and Economic and Social Change*, and The *Sapru Report*(1945).

symbols and personalities. This was further evident when *Satyarth Prakash* (The light of truth) the most important book of Arya Samaj, was banned in Sind in 1944. The demand for the ban had been made time and again by several Muslim groups since its publication in 1875, as they insisted that it contained severe insulting references to the Prophet Mohammad and to Islam, which according to them was offensive to the Muslims all over country. But the British did not endorse their position. In December 1943, during a public meeting in Karachi, the Muslim League reiterated this demand and appealed for action. In 1944, due to immense pressure from Muslim public opinion, the Sind government led by the Muslim League announced the ban. Gandhi was distressed with the ban. He maintained that, "Satyarth Prakash enjoys the same status for 40 lakhs of Arya Samajists as the Koran for the Muslims and the Bible for the Christians."[223] He argued in his article entitled *Sind bans Satyarth Prakash*:

> The virtue of toleration is never strained, especially in matters of religion. Differences of religious opinion will persist to the end of time. Toleration is the only thing that will enable persons belonging to different religions to live as good neighbours and friends. Religion never suffers by reason of the criticism- fair or foul of critics, it always suffers from the laxity or indifference of its followers.[224]

Ironically, about the same book, writing in *Young India* in 1924 about *Hindu- Muslim tension: Its cause and cure*, Gandhi had said:

> I have read Satyarth Prakash, the Arya Samaj Bible…. I have not read a more disappointing book from a reformer so great…. He has unconsciously misrepresented Jainism, Islam, Christianity and Hinduism itself… One having even cursory acquaintance with these faiths could easily discover the errors into which the great reformer was betrayed.

Although he was extremely critical about *Satyarth Prakash*, he believed the banning of the book was uncalled for.[225] Gandhi's position with regard to *Satyarth Prakash*

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223 *Harijan*, November 3, 1946.

224 Ibid.

225 Ibid.

indicated his approach to the question of tolerance and his discomfort with the idea of banning any form of publication. Rather, the remedy he suggested to counter writings containing vilification or denigration of other religions was different. In his article *Hindu- Muslim tension: Its cause and cure*, Gandhi was particularly critical of writings-tracts and pamphlets -which according to him had played significant role in heightening Hindu-Muslim tensions. But he believed that the best mechanism to counter this competitive vilification of each other's religion was the role that local community leaders should play, for instance by taking measures to find ways of "stopping these publications or, at least, discrediting them and distributing clean literature instead, showing tolerance for each other's faith."[226] He also insisted on creating a public opinion that could reject such incitements. He believed that the regulatory and legal mechanisms fail "to serve the purpose intended, except temporarily, and in no case do they convert the writers ….. The real remedy is healthy public opinion that will refuse to patronize poisonous journals."[227]

Gandhi's was a moral position on the subject and was also reflective of his general aversion to the role that law and government should play in an ideal society. Rather he insisted on building local networks to counter the threat posed by offensive publications. However, many other nationalists would not uphold this position. Though they were critical of the ban on *Satyarth Prakash*, they had their own reasons. For example, Nehru claimed it to be a larger issue of civil liberty and religious freedom. He was worried that "this may become a precedent for future invasions on all civil rights and liberties." [228] Nehru asserted that "I shall always endeavour to have civil liberties in all forms maintained and practised in India and to resist any encroachment on them."[229] For Nehru, to take a principled position when the ban was called by the Muslim League's government in Sind was easy, but one can contrast this view from his position

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[226] M.K. Gandhi, *The Collected Works of Mahatma Gandhi*, vol. 24, May-August 1924 (Delhi: Publications Division, Ministry of Information and Broadcasting, 1967), 261.

[227] *Harijan*, 28 May, 1931.

[228] *Harijan*, 5 October, 1945.

[229] Ibid.

in 1937 after Indian National Congress had emerged in power in most of the provinces. He wrote in *Harijan* on 23rd October:

> Inspite of every desire to avoid it, coercive action may become necessary and in such cases ministries will inevitably have to undertake it. Such coercive action should only be undertaken where there has been violence or incitement to violence or communal strife.

Nehru's approach was more realist than Gandhi's as he saw the inevitability of the state's role in regulating free speech in certain circumstances especially when it increased communal tensions. He insisted that in such cases, governmental interferences was necessary, a position that he maintained even after India became independent.

The opposition to the ban seemed to situate Nehru in the same side as S. P. Mookherjee[230], who also criticized the ban, however, for completely different reasons. Mookherjee condemned the ban as an attack on Hinduism. He took the opportunity to appeal to the Arya Samajists to work in cooperation with other parties for the consolidation of the Hindu forces and freedom of Hindustan.[231] The Arya Samajists organized a massive *satyagraha* in Sind but in vain.[232] The book remained banned even after all such agitations.

It was evident that though the ban was opposed by the nationalists, different sections had different reasons for their oppositions. It was particularly true in cases where the freedom of speech and expression was seen as being in collision with religious values and identities. So, Gandhi's opposition was a matter of principle against use of government machinery for such cause, Nehru's opposition on the other hand was based on his arguments for civil liberties, whereas Mookherjee saw it as a conscious ploy by

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230 Member of Congress party considered very close to religious nationalists of the time, and who later founded the right wing nationalist party Bharatiya Jana Sangh (which would later evolve as BJP).

231 Bal Raj Madok, *Portrait of a Martyr: Biography of Dr. Shyama Prasad Mookerjee* (Delhi: Rupa, 2001), 53.

232 "Satyagraha in Sindh launched," *Times of India*, January 17, 1947.

Muslim fundamentalists. The divergent arguments reveal no unanimity over the criticism of the ban, but rather at ambiguities in nationalist positions regarding censorship. These issues once again came out in the open when these personalities sat to write the Constitution for Independent India, I discuss in the next chapter.

5. Conclusion

What ramifications did the debates over censorship during colonial times have on the understanding about freedom of speech and expression? On the one hand, the legal provisions and limitations introduced by the British formed the guiding principles for the free speech discourse in India, and on the other hand, in the absence of any comprehensive civil liberties movement, the mediums of nationalist responses like vernacular press, tracts, books and iconographies became the rallying point around which the freedom of expression debate centred.[233] Freedom of expression remained largely dependent on the interpretations of law offered by the colonial authorities. Neither the British nor the Indians treated freedom of expression as a fundamental individual right. It was invoked based on the utility it served for the community at large. The British attitude to freedom of expression in relation to "offence", or "insult" to religious identities reflected a subtle dichotomy. On the one hand, in legal and legislative language, the limits to free expression was pronounced and kept on growing (in the form of section 153(A), or section 295(A) of the IPC and other similar regulations) on the other hand, post-1857 they claimed to maintain a policy of non-interference in the religious activities of the natives. The use of the colonial laws was subject to the interests of the imperial design, which was believed to be best served by the colonial state maintaining an image of a neutral arbitrator of religious conflicts. So, at times due to the fear of being branded as biased towards a particular community, and at other times, in order to extract maximum benefit from such antagonisms, they exercised "selective censorship."

[233] This however changed after 1870s when tracts, books and iconography also became sites of contestations and debates. Christopher Pinney, "The Nation (Un)Pictured? Chromolithography and 'Popular' Politics in India, 1878-1995," *Critical Inquiry* 23, no. 4 (1997), 834-867.

On the part of the colonized Indians, the response was equally diverse. The early liberals like Rammohan Roy argued for some limits to freedom of speech and expression especially in conditions of "libel" and "sedition," but thought it to be a potent weapon to respond to the challenges of Christian missionaries. But gradually the same freedom was used by Hindus and Muslims against each other. As these antagonisms escalated and began to take violent shape, there were demands from within the Indian communities that they had conferred religious hatred. The nationalists questioned the British claim that they had conferred religious liberty and toleration on Indian society through their policy of impartiality in the domain of religion, and argued that it only allowed men of various creeds to play fast and loose with religion.[234] There was no clarity in the position of Indian nationalists on the subject. Though they were struggling for greater freedom of expression to criticize the authorities, they were not sure if similar freedom should be allowed in religious subjects. This contradiction was evident in their role in making of section 295(A) as well as when *Satyarth Prakash* was banned. It can be concluded that when India became independent, it carried with itself an ambiguity, vis-a-vis the position over freedom of expression, particularly in relation to religious offense. There was, however, a looming consensus that such freedom needed to be controlled and regulated through law. This history of contradictions and the role of vernacular press in communal violence had a significant impact on the future of freedom of speech and expression, when it was being debated in the Constituent Assembly.

[234] Jalal, *Self and Sovereignty*, 80.

CHAPTER 3

FREEDOM OF EXPRESSION AND RELIGIOUS VILIFICATIONS: DECODING THE CONSTITUTIONAL AND LEGAL DEFINITION OF "LIMITS"

1. Introduction

In the last chapter I discussed how the debates around freedom of speech and expression took shape during colonial period. It was argued that in the colonial context the idea of freedom of speech and expression acquired a position of uncertainty in the story of colonial dominance and the nationalist response to it. On the part of the Indians, the argument for freedom of expression developed in relation to the language of opposition to the colonial rule but there remained a marked ambiguity in their position over cases concerning religious propaganda. Although they favoured freedom of expression, they were not sure about how to respond when the same freedom became instrument for what could be seen as religious vilification, and hence a tacit consensus emerged that such freedom needed to be subjected to certain restrictions.

Ironically, the ambiguity did not end even after India became independent in 1947. The celebrations of the birth of a new nation was accompanied with the general feeling of hope that everything associated with the colonial rule would be undone, and independence along with the formation of the new state under the leadership of the nationalists, would usher a new sense of freedom with an uncompromising respect for civil liberties.[235] However, the challenge of nation making and the pressure of the context did not allow space for such ambitious intervention. This dichotomy was clearly evident in the CAD[236] and the Constitution that took shape thereafter. Kaviraj has

[235] Uday Singh Mehta, "Constitutionalism," *The Oxford Companion to Politics in India*, ed. Niraja Gopal Jayal and Pratap Bhanu Mehta (New Delhi: Oxford University Press, 2011), 17.

[236] Only volume number and page number of the CAD will be mentioned hereafter.

significantly argued that "before independence as power was not in the hands of the nationalists, political and ideological position could be articulated only as ideas, which allowed the liberty to think beyond barriers, almost a utopian imagery of independent India."[237] The real challenge therefore was visible when the same nationalists occupied positions of power and responsibility to shape the future of the nation.

In this chapter, I explore the constitutional and legal provisions that govern the issues of freedom of speech and expression in Independent India. For this, the chapter has been divided into two parts. The first part discusses how the divergent views about the space for state intervention vis-à-vis such rights and liberties were represented and confronted one another in India's CAD, and reconstructs the negotiated settlement that emerged during the course of CAD. The aim is to examine how the issue of rights in general and freedom of speech and expression in particular was discussed and debated, which will also highlight the concerns and motivations among the constitution makers with regard to such rights. In the second part I discuss the amendments carried out to the constitution and other statutory laws. Two constitutional amendments (first, and sixteenth), and the amendments to section 295(A), and 153(A) (in 1961 and 1969) are discussed in details. These amendments re-defined the scope of freedom of speech and expression and the debates in the Parliament was also representative of the attitude of the lawmakers in independent India. The central argument in this chapter is that the constitutional as well as legal provisions for freedom of expression, and its limits, allowed significant space for the intervention by government. Most of the terms used to delimit the scope of freedom of speech and expression under the constitution – libel, slander, defamation, contempt of court, decency, morality– are vague and leave space for multiple interpretations. This does not only invite extensive forms of state intervention, but also increases the possibility of its misuse. At the same time, the paternalistic approach of the lawmakers, and the context of "urgency" in which they amended significant laws (both constitutional and statutory), further allowed the widening of the net for government intervention in individual's right to freedom of

[237] Sudipta Kaviraj, *The Enchantment of Democracy and India: Politics and Ideas* (New Delhi: Permanent Black, 2011), 76.

speech and expression. A new language of liberty, loaded with the concern for social cohesion and communal harmony was introduced, which made the right to freedom of speech and expression in India conditional to significant limitations, and presented a skewed conception of individual rights – dependent on the state at every step to authorize its legitimacy and appropriateness.

2. Constituent Assembly and the Idea of Freedom of Speech and Expression in the Constitution

The Constituent Assembly became the site where divergent visions about India's future interacted to produce a document which could become the "statement of Indian identity."[238] The discussions in the Assembly over freedom of speech and expression lacked any political or philosophical argumentation about the importance or need for such right in a democracy. Its inclusion in the constitution was considered *sine qua non*, partly because of the historical background of the national struggle and more because of the fact that most part of India's constitution was largely borrowed from the declarations or constitutions of the then successful democracies. The Bill of Rights, the debates over First amendment in the US, and others, were clear in the minds of the constitution makers. But it was not an exclusive case with freedom of speech and expression. Many political concepts that were used and included in the constitution were little debated or reflected upon by the constitution makers.[239] Sunil Khilnani has rightly argued that such evasion "retracted attention from how these elements might interact with one another over time, producing mutations in the forms of democracy, while also changing the internal character of the nature of representation, rights and equality."[240] However, it did not mean that the ideas were not discussed at all. For

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238 Bhikhu Parekh, "The Constitution as a Statement of Indian Identity," in *Politics and Ethics of the Indian Constitution*, ed. Rajeev Bhargava (New Delhi, Oxford University Press, 2008), 43-58.

239 See, S. Gopal, ed., *Selected Works of Jawaharlal Nehru* (New Delhi: Oxford University Press, 1991), 247. Though Nehru claimed in the Assembly on 13 January 1946 that, "we have laid down no theoretical words," the constitution was full of political concepts and ideas that required far more clarity than was rendered.

240 Sunil Khilnani, "The Indian Constitution and Democracy," in *India's Living Constitution: Ideas, Practices, Controversies*, ed. Zoya Hasan, Esridharan, and R. Sudarshan (London: Anthem Press, 2005), 70.

example, in relation to freedom of speech and expression, the members debated extensively about the appropriate limits to such freedom.

The issue about the restrictions and its rationale came up at an early stage when the *Draft Report* submitted by the sub-committee to Advisory committee for consideration subjected freedom of speech and expression to "public order" and "morality." It also included provisions for action against "publication or utterance of seditious, obscene, slanderous, libellous or defamatory matter."[241] Pointing out the lacunae, members like K. T. Shah[242] argued that the limitations should be minimal and terms like "morality" should be avoided as they were vague and could be misused.[243] On the opposite of the spectrum were members like A. K. Ayyar[244], who argued that exceptions were too narrow and should be broadened in order to be used by the state for security and other emergencies. These discussions forced early amendments and the *Interim Report on Fundamental Rights* that was presented to the Constituent Assembly by the Advisory committee read:

> 8. There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the government of the union or the unit concerned whereby the security of the union or the unit, as the case may be, is threatened:
>
> a) The right of every citizen to freedom of speech and expression: provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libellous or defamatory matter actionable and punishable.[245]

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241 See, B. Shiva Rao, *The Framing of India's Constitution: Select Documents*, Vol. II (Delhi: Indian Institute of Public Administration, 1966-68), 138.

242 K. T. Shah was a London School of Economics alumnus and a left oriented member representative from Bombay.

243 Rao, *Framing of India's Constitution*, Vol. II, 157.

244 Ayyar was a well known lawyer from Madras constituency and represented the liberal school within Congress Party.

245 See, Annexure (Tuesday, April 29, 1947), CAD III, 2.

This draft attracted severe criticism from different ends. For example, Somnath Lahiri[246] argued that the provisions seemed to have been framed "from the point of view of a police constable." He also warned that the phrase "grave emergency" was one open to interpretation, and hence its misuse by the executive was possible.[247] Looking at the kind of hostility it had generated, Patel moved clause 8 the next day omitting the provisos contained in clause 8(a). Based on the Committee reports and their discussion in the Constituent Assembly, B. N. Rau[248] prepared the *Draft Constitution* which was cleared by the Drafting Committee before being placed in the Assembly. Interestingly, the Draft Constitution included a set of new provisos and read as follows:

> 13. (1) Subject to other provisions of this article, all citizens shall have the right- (a) To freedom of speech and expression;
>
> (2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the state from making any law, related to libel, slander, defamation, sedition or any other matter which offends against decency or morality or undermines the authority or foundation of the state.

These new inclusions received polarized reactions, some opposing the provisos and the other in its support. Those opposing included K. T. Shah[249], Damodar Swaroop Seth[250], Mahboob Ali Baig[251], Sardar Hukam Singh[252], Pandit Thakur Das Bhargava[253], among

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246 Lahiri was a communist leader from West Bengal.

247 CAD III, 384-5.

248 He was a civil servant and appointed as the Chief Advisor to the Constituent Assembly. He played a key role in this capacity in formulating the Indian Constitution.

249 K. T. Shah was a London School of Economics alumnus and a left oriented member representative from Bombay.

250 Seth was a socialist leader representing United Provinces.

251 Baig was a prominent Muslim representative from Madras.

252 Sardar Hukam Singh was one of the two members included as Sikh representative. HE belonged to Shiromani Akali Dal and was Secretary of National Democratic Front formed by S. P. Mookherjee. Later he joined Congress Party and became the Speaker of the Lok Sabha in 1962.

253 Bhargava was a representative from East Punjab. Though a Congress member, he was known for his strong critical views against the government and was largely oriented to right wing politics.

others. They invoked the Bill of Rights of American Constitution and argued that the fundamental rights should be absolute and not subject to exceptions. It was feared that the presence of provisos made the liberty insignificant. Damodar Swaroop Seth said: "Rights guaranteed in article 13 are cancelled by that very section and placed at the mercy of the high handedness of the legislature."[254] There was a general feeling that the presence of provisos in the article seemed as if the right was "given by right hand and taken away by left."[255] They were concerned about the executives in future acting like British in the past and using laws to curb political dissent. Most of the advocates of such unconditional institutional protection for civil rights belonged to political minorities: Muslims, Communists, and Hindu Right. Based on their distrust of government's role, they argued that the decisions about regulation of freedom of speech and expression should be left exclusively for the judiciary which could decide on a case to case basis.

Contrary to this view were those who believed that some form of censorship was important for government to enable it to handle the turbulent times that the country was undergoing. For example, Shri K. Hanumanthaiya[256] said:

> We went through a course of suffering and sacrifice which were imposed upon us by the repressive laws of British imperialism; this naturally made us votaries of unadulterated fundamental rights and that was our hope. But, ultimately when we emerged out of those innumerable difficulties, we are faced, within our own society, with elements who want to take advantage of those rights in order to do violence to men, society and laws.... No man who believes in violence and who wants to upset the State and society by violent methods should be allowed to have his way under the colour of these rights. It is for that purpose that the Drafting Committee has thought it fit to limit the operation of these fundamental rights.[257]

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254 CAD VII, 712.

255 Ibid.

256 Hanumanthaiya was a prominent Congressman from Karnataka, considered to be very close to Nehru.

257 CAD VII, 754-5.

Those in favour of restrictions insisted on the need to show faith in the executive's commitment not to misuse power since it was under democratic oversight.[258] Defending the presence of provisos, T. T. Krishnamachari[259] argued that it just reflected the middle path adopted by the government to balance freedom with responsibility.[260] There were others like Amiyo Kumar Ghosh[261], who were not against the idea of including provisos, but believed that the vagueness of the terms used to limit such freedom should be avoided as it could lead to ambiguity and misinterpretations. However there seems to have been no serious response to such arguments.

At the end only K. M. Munshi's[262] amendment to delete the word "sedition" from article 13(2) was accepted and the re-numbered provision, finally adopted, read as follows:

> 19. (1) all citizens shall have the right- (a) to freedom of speech and expression;
>
> (2) nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the state from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the state.

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258 Such faith was reflected in the speeches of Congress Party members like Algu Rai Shastri among others. CAD VII, 767.

259 Krishnamachari was a prominent Congressman from Madras and an efficient economist.

260 CAD VII, 770-3.

261 CAD VII, 769-70. Ghosh was a representative from Bihar and he argued: ".... one expects that so far as the rights of the people are concerned, they should be expressed in clear, simple and straight language, so that a common man when he reads the Constitution can understand exactly and precisely what are his rights and what are the checks to his rights. I do not propose to say that at times of emergencies or grave needs freedom does not require to be checked to a certain extent. I believe in checks and balances, but at the same time, I must say that those checks should be very precise, and clear and should not be couched in ambiguous language and left to courts for decisions."

262 Munshi was one of the most vocal members in the Constituent Assembly. Though a Congressman, his ideas were largely influenced by right wing ideology.

3. The CAD and the Central Concerns regarding Freedom of Expression

The debates in the Constituent Assembly reflected three broad concerns related to Freedom of speech and expression in particular: a) there was concern about any continuity to the British form of rule and colonial laws, and at least symbolically there was a unanimous negation of it; b) there was concern about whether the government could always be trusted on questions relating to freedom of speech and expression and there was agreement on the need for a "two-tiered" response system as it was agreed that the judiciary should play an important role as the protector of fundamental rights.; and c) set against the back drop of Partition, the Constitution makers were also taking into account and reacting to the new set of challenges connected with communal antagonisms.

3.1. The Fear of Continuing Aspects of British Rule

The concern that the restrictions on freedom of speech and expression by the government represented a continuing aspect of colonial policies of control was reflected in the way the reference of British rule was invoked to either criticize the government or question its intentionality. For example, Mr. Mohammed Ismail Sahib[263] raised his concern about the scope of the provisos and said:

> It was different when the Britisher, the foreigner was in the country and that now it's our own rule. True, but that does not mean that we can deal with liberty of the citizens as we please……. Therefore, Sir, the citizen must be protected against the vagaries of the executive in a very careful manner as other self-governing countries have done.[264]

Similar attitude was reflected when other members compared the expectations from the constitution of a new state, with the history of denial of such rights by an autocratic

[263] Ismail Sahib was a prominent member of Muslim League and represented Madras Presidency.

[264] See CAD VII, 725.

government. For example, Somnath Lahiri in the course of debate accused Sardar Patel (then Home Minister and the Chairman of the Advisory committee on fundamental rights) of trying to arm the future legislature and executives with more powers than the British government itself, which according to him, was "not the basis of democracy."[265] It is ironic, however, that though there was a firm determination to be different from the British in forms of administration and rule in general- or to say at least in the visible forms of governmental manifestations- the fact that more than one third of the constitution was taken from 1935 Act and further, article 372 allowed all the then existing laws to continue (subject to review power of the judiciary) did not seem to be in consonance. The fear of existing laws affecting the sanctity of these rights was raised at several instances. Mahboob Ali Baig pointed out that the laws like the Press Acts, Criminal Law Amendment Acts and Security Acts were promulgated by British for repressive purposes and the continuation of such laws was both unwarranted and useless in a democracy.[266] Similar fear is reflected in Sardar Bhupinder Singh Mann's claim that "to apply the existing law in spite of changed conditions really amounts to trifling the freedom of speech and expression. From the very beginning we have stood against the existing laws, but now you are imposing them on us."[267] One could also see a fierce opposition launched to the inclusion of word "sedition" within the provisions restricting freedom of speech and expression. The history of bitter experiences faced by the leaders of nationalist movement in the hands of the British, and the scope for its misuse in future, were cited as primary reasons for such opposition.[268] Eventually the word sedition was dropped.

A special clarification had to be offered by Nehru and Ambedkar claiming that no such intrusion was intended. It was forcefully argued that article 8 (article 19 in the present constitution) would be a safeguard against any such attempt by future authorities in power. It was further assured that any law which was in force in any part of the land

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265 CAD III: 2, 384-5.

266 CAD VII, 728.

267 CAD VII, 750. Along with Sardar Hukam Singh, Mann was the other Sikh representative inducted in the Assembly.

268 Volume VII of CAD is full of such instances where leaders of different parties highlighted this issue especially in the discussions of 1st December, 1948.

shall be held as void, if the judiciary found it to be inconsistent with the provisions guaranteed under fundamental rights.

3.2. Uncompromising Faith in the Judiciary

It was almost unanimously held that the judiciary should be the sentinel of the rights promised by the constitution. This confidence in the judiciary was encouraged by the concern that the executives in future could misuse their capacities if these rights were not granted such protections. Sardar Hukam Singh and Pandit Thakur Das Bhargava argued that if the fate was left in the hands of the authorities in power, the fundamental rights would become "illusory" and hence the Supreme Court should have the "final say with regard to the destinies of our nationals."[269] There was a strong set of voices in the Assembly arguing that "unconditional" rights be granted by the constitution, and in cases of disputes, the judiciary can judge its validity, as in the American case.

The faith in the judiciary was also shaped by two other factors: a) the positive role that judiciary had played in preservation of civil liberties against executive excesses in other successful democracies. The American case was an instant reference point. Mahboob Ali Baig cited the Fourteenth Amendment of the US constitution and the British experience to highlight the primacy of the judiciary contrary to the German experience where power was misused by legislature and executive under Hitler's rule;[270] b) The enthusiasm also flowed from the experiences of the working of the Supreme Court at home, especially in its last phase before independence. As legal historians like Rohit De have demonstrated, there were instances of severe confrontation between colonial state and federal judiciary when the later struck down a number of emergency war time legislations. This not only took both the colonial officials and Indian public by surprise, but also encouraged a degree of faith in the judiciary among Indians themselves.[271]

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269 CAD VII, 733-45.

270 CAD VII, 728.

271 Rohit De, "Emasculating the Executive: The Federal Court and Civil Liberties in Late Colonial India: 1942-1944", in *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex*, ed. Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley (Cambridge, New York: Cambridge University Press, 2012), 59-90.

All these factors invoked a deep reverence for the judiciary as the protector of such rights. However, there was a small section, mostly amongst Congress loyalists, who were not enthusiastic about giving extensive powers to the courts. For example, K. Hanumanthiya doubted the court's capacity of coming to grips with rapid changes within the country. He also argued that the function of courts was only to interpret and the legislature should therefore frame laws that could adjust according to the demands of changing times and not depend on the judiciary for its innovations.[272] Similarly, G.B. Pant[273] was afraid that the future of the country will be determined "not by the collective wisdom of the representatives of the people but by the fiats of those elevated to the judiciary."[274] "We cannot be subject to varying court judgements, to the whims and vagaries of judges…… If we can't put mischief makers in jail, there is no end to communal disorders," he said.[275] It seems that in order to maintain a balance although the judiciary was assigned a central role via article 13 and article 32 of the constitution, the space for such judicial intervention was in some ways limited by pronouncing provisos to freedom of speech and expression under article 19(2).

3.3. Responding to the Complicated Context

The making of the constitution took two years eleven months and eighteen days. This period was full of turmoil and disturbances in the country. Though the period was marked by the transition from a subjugated colony to a free nation, it was accompanied by partition and the widespread communal violence. Such transformation posed serious challenges to the project of nation building facing the framers of the constitution. A central question they had to confront concerned the fate of the religious minorities who had chosen to stay back. There was on the one hand the fear among minorities of being suppressed by the Hindu majority, something about which the Muslim League had long

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272 CAD VII, 754-5.

273 Pant was one of the top most leaders of the Congress Party and the first Chief Minister of Uttar Pradesh who later became the Home Minister in Nehru's cabinet.

274 As quoted in Austin, *Working a Democratic Constitution*, 85. Pant made these comments in one of the meetings of Sub-Committee on Fundamental Rights of which he was a member.

275 Ibid.

been warning, while on the other hand there was expectations of some "reward" in return of their decision to stay back- rewards in the form of institutional protection of their political and cultural rights as promised by the nationalists during the course of freedom struggle and as they had enjoyed during the last phase of British rule.[276] It was also a test for the new Indian leadership, since they were required to refute the historical claim made by the British that the British had special obligations to protect the minorities as they could not find justice if left in the hands of other Indians.[277] So, Patel made it explicit in the first meeting of the Advisory committee on minority rights that:

> It is for us to prove that it is a bogus claim, a false claim, and that nobody can be more interested than us in India, in the protection of our minorities. Our mission is to satisfy everyone of them…. at least let us prove we can rule ourselves and we have no ambition to rule others.[278]

There was mounting pressure on the Assembly to handle in tandem the issues of rights and liberties and the concerns of minority protection and national integration. Though these were not mutually exclusive goals, the real challenge was to derive an acceptable and workable balance among them all. In the process, the Assembly arrived at remedies that had lasting impact on, and consequences for the future of Indian democracy. This was so in atleast three respects, affecting the discourse of free speech: a) the location of the value of liberty in relation to equality and fraternity in the democratic discourse; b) Individual *vs*. group in the Constitutional vocabulary; and c) freedom of speech and expression vis-à-vis "communal hatred."

3.3.1. *The Location of the Value of Liberty in relation to Equality and Fraternity*

In the Indian context, it seems that the values of equality and fraternity were placed at a higher pedestal than that of liberty. The constitution makers of a nation which had experienced police repression, arbitrary governmental action and brutality under colonial

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276 Jaffrelot, Religion, *Caste and Politics*, 8.

277 Austin, *Working a Democratic Constitution* 59.

278 "Proceedings of the Advisory Committee," February 27, 1947, in Rao, *The Framing of India's Constitution*, Vol. 2.

regime showed little respect for civil liberties and individual freedom. The enunciation of fundamental individual rights was conjoined with a set of conditions under which the state could exercise its power and limit such liberties to realize a broader national and political vision. So, a broad understanding was achieved that individual liberties would attain a subsidiary position within the constitution and more emphasis was rendered on the values of equality and fraternity. Ambedkar's statement in the Assembly on November 4, 1948 is significant in this regard. While distinguishing between non-fundamental rights and fundamental rights he argued that while the non fundamental rights are created by agreement between parties: "Fundamental rights are gifts of the law. Because fundamental rights are the gift of the state it does not follow that the state cannot qualify them."[279] So, if the need be, the state had every legitimate right to compromise such individual rights and liberties for the larger goals. In a context marred by riots and political violence, it was considered imperative that the state should assert its prerogatives, and with extensive powers under its command should guide the process of nation building by inculcating a sense of trust and faith among communities which in turn required projecting the values of fraternity and promises of equality where necessary.[280]

Broadly speaking there were two positions amongst those who supported such limitations of individual liberties: a) the first was expressed by CAD members who argued that extensive powers in the hands of the state was required in order to control the conflictual situation that had arisen post independence. The state was expected to maintain peace and order in society by not only enforcing law and order but also enabling solidarities and trust to emerge among various communities especially between Hindus and Muslims. This idea was articulated by members like Hanumanthaiya and T. T. Krishnamachari. b) The other position was held by those CAD members who believed that by its very nature liberty was different from license and the role of state was important also to ensure that clashes of different perceptions of liberty did not occur. No rights therefore could be absolute. This position was held by members like Ambedkar, Patel and others. As the proceedings of the CAD turned out, these voices were very dominant in the house and led to the fact that the provisions in

[279] CAD VIII, 40.

[280] CAD VII, 754-5.

the constitution favouring individual rights were made conditional to the authority of the state to manage liberties to ensure equality and fraternity in society.

3.3.2. *Individual v. Group in the Constitutional Vocabulary*

The prevailing context and the history of national movement also had a deep impact on the way individual rights were perceived in relation to group rights in the constitution. Within the Constituent Assembly, there was a significant section who wanted individuals and not groups to be the bearers of rights. For example, G. B. Pant condemned the practice of invoking the category of "community" thereby undermining the value of "individual," who was the citizen and therefore should be centre of concern.[281] This attitude, as Jaffrelot has argued, represented a classical "Jacobin rejection of communities."[282] It was also reflected in the ideas of Nehru, Patel, and Radhakrishnan among others. This rejection of communities was based on two central arguments: a) The project of nation building required a strong unity of the nation, which could be hampered by due allegiance to intermediary forms of identity such as religion or caste; and b) the fear that recognition of minority identities would inevitably lead to the isolation and neglect of these communities by the majorities in the future.[283]

There was yet another section among the CAD members who invoked individual rights and national unity considerations virtually interchangeably. This position was represented by Rajkumari Amrit Kaur[284], Hansa Mehta[285] and Minoo Masani[286]. Their opposition to community recognition was not only based on the importance of equal rights for all

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281 CAD I, 332.

282 Jaffrelot, Religion, *Caste and Politics*, 7.

283 CAD III, 330. It was reflected in Nehru's concern when he argued "(In) a full-blooded democracy, if you seek to give safeguards to a minority, and a relatively small minority, you isolate it."

284 One of the most prominent women leaders in Indian National Congress, Kaur became the Union Health Minister in Nehru's first cabinet.

285 Mehta was a reformist and social activist. She was known for her strong views on Uniform Civil Code and all forms of reservations except for Scheduled Castes.

286 Trained as a Barrister at London, Masani was one of the founding members of Congress Socialist Party in 1934.

citizens in nation building, but also from a fear that if the cultural communities were thus recognized, without drastic internal reform among these communities, it would mean the continuation of the subjugatory illiberal practices within each such community which would be contrary to the interests of large sections within these communities that were vulnerable, like women.[287] So, they preferred the individual based concept of rights, equal for all. This was reflected in their consistent support for Uniform Civil Code, and opposition to the addition of "practice" and "propagate" religion as a fundamental right.[288]

Contrary to all these positions, were the view of other members like K. T. Shah, K. M. Munshi, and representatives of different minority community who argued for recognition of the rights of communities based on the significance of religious identity to the self.[289] Eventually, as it happened, this latter position was in part accepted and space was made for recognition of groups and the claims of community rights. However, with independence the context had changed and partition in the name of religion had convinced the members that though minorities' right to culture should be protected, they should have no claim to benefits in political rights either in form of reservations or separate electorates.[290] Many of the minority leaders including several Muslim leaders welcomed the decision.[291]

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[287] Rao, *The Framing of India's Constitution*, Vol. 2, 140, 165, 173, 208. Also see the note of Rajkumari Amrit Kaur, Hansa Mehta and Minoo Masani to the fundamental rights sub-committee dated 14 April, 1947 in Rao, *The Framing of India's Constitution*, vol. 2, 162.

[288] Ibid.

[289] See, Gurpreet Mahajan, "Religion and the Indian Constitution: Questions of Separation and Equality," in *Politics and Ethics*, ed. Bhargava, 300.

[290] This point has been emphasized by several scholars including Neera Chandoke, "Individual and Group Rights: A View from India", in *India's Living Constitution*, ed. Hasan, Sridharan and Sudharshan, 207-41; Rochana Bajpai, *Debating Difference: Group rights and Liberal democracy in India* (Oxford: Oxford University Press, 2011); Rochana Bajpai, "Cultural Rights of Minorities during Constitution-making: A re-reading", in Gurpreet Mahajan and Surinder S. Jodhka (ed.), *Religion, Community and Development: Changing Contours of Politics and Policy in India* (London, New Delhi: Routledge, 2010).

[291] See, CAD III, 296. For example Naziruddin Ahmad considered the demand for reservations as a result of post-partition "fear complex" which was now fast disappearing and the situation was improving. Also see Tajamul Husain, CAD III, 270; Z. H. Lari, CAD III, 283.

In the case of religious and cultural rights, on the one hand the leaders of religious minorities wanted no interference of the state on issues of institutional and cultural practices internal to religion, but at the same time they expected protection and support in the form of social welfare programmes that included education and propagation of cultural values. About the abrogation of political benefits and protection of socio-cultural rights, Gurpreet Mahajan is of the opinion that in the post-partition phase, the minority leaders were more interested in preserving their cultural rights of their communities than in upholding the political rights that they previously enjoyed during the British rule.[292] Rochana Bajpai adds to this understanding by demonstrating that unlike political safeguards, the language of cultural rights of minorities found support in key nationalist ideals. Preservation of such rights was seen as a part of the secularism that the new state was expected to follow, whereas the political safeguards in the form of either separate electorates or reservations was considered a threat to the cause of national unity. It is not surprising therefore that unlike the standard liberal position, groups as well as individuals were recognized in nationalist opinion as the subjects of rights and entitlements.[293] The Constituent Assembly took a balanced position on this issue: on the one hand the right to religion – to profess, practise and propagate – was conferred to all persons, on the other hand the freedom was not left unfettered – state intervention was authorised in the interest of protecting "public order, morality and health."[294] It is equally true that cultural pluralism, rather than liberal individualism became the operative principle of democracy, and though, the Constitution had guaranteed a set of individual political rights like freedom of speech and expression, almost all of these were severely circumscribed. The cultural community, on the one hand, and national interest, on the other, curtailed the free expression of these rights.[295] This position was indicative of the approach of the government in cases where individual rights came in collision with group rights. For example, when the claim of religious "offense" is presented as a claim for protection

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[292] Gurpreet Mahajan, "Religion and the Indian Constitution."

[293] Rochana Bajpai, "Cultural Rights," 291. The idea is further elaborated in Bajpai, *Debating Difference*.

[294] Rochana Bajpai, "Cultural Rights," 293.

[295] Mahajan, *Identities and Rights*, 38.

promised under right to freedom of conscience and free profession, practice and propagation of religion under article 25, and is shown to be threatened by someone's freedom of speech and expression guaranteed under article 19(1)(a), it presents a complicated situation because though each of these rights are legally treated as individual rights, the practical implications of the former is for a wider public.

3.3.3. *Freedom of Speech and Expression and the Issue of "Communal Hatred"*

The context in which the constitution was being drawn also brought in to question the relation of freedom of speech and expression to communal harmony. The role of press and publications as means for propaganda to incite communal hatred had been significant. Several members were convinced that such incitement to religious and communal hatred should be prevented by the state. So during the meeting of the Advisory Committee on Fundamental Rights, A.K. Ayyar insisted on the inclusion of the words "calculated to promote class hatred" as condition to limit freedom of speech and expression.[296] This idea was supported by K.M. Pannikar[297] who wanted the addition of "class or religious hatred" as one of the provisos under article 19(2).[298] On this, Rajagopalachari noted that some of the provisions for such action were already present in existing laws within IPC especially under section 153(A), therefore he argued that the best way to deal with it was by redrafting the whole clause and saying – "The right of every citizen to freedom of speech and expression, subject to criminal law." Rajagopalachari opined that "the fundamental peace and orderly progress" of the country depended upon "communal peace and harmony" and if the "speeches and utterances likely to foster communal hatred" were not prevented "we cannot have progress."[299] What Rajagopalachari was suggesting was extremely dangerous, as it

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[296] See Ayyar's Comment on the Draft report, April 10, 14 and 15, 1947, in Rao, *Framing of India's Constitution*, 157.

[297] A well known journalist and historian who represented Punjab.

[298] Rao, *Framing of India's Constitution*, 157. Also see "Proceedings of the meetings of the Advisory Committee on 21-22 April, 1947" in the same volume at page 231.

[299] Ibid., 232.

would have meant that the fundamental rights would become subordinate to criminal laws of the land, which incidentally, were devised by the British, and were not at all amended as of then. It would have definitely made the limits placed upon such rights more central and seminal, than the idea of liberty itself. It was to be expected that such attempts to curtail liberties faced severe criticism from among the members. S. P. Mookherjee[300] thought that such expression could cut both ways. It was possible that simply expressing opinions against the party in power might be construed as class or communal hatred and punished.[301] Bakshi Tek Chand[302] and H. C. Mookherjee[303] pointed out that their worries about abuse were rooted in their experience under the British rule and feared that such powers in the hands of future executives could be extremely dangerous.[304] K. M. Munshi took the debate forward and argued that "class or communal hatred" was omitted as it was feared that the state units would make drastic laws under such provisions in order to curtail even the basic forms of free expressions. For him "breach of peace or public order" should be important for restrictions. He said: "The right of free expression is now recognized all over the world, and it has been felt that speeches or writings tending towards communal or class hatred, if they do not go to the extent of causing violence or crime, may be permitted."[305] As none of the side was ready to relent, the amendment was put to vote whereby the amendment proposed by Rajagopalachari was defeated. Even though the amendment failed, it seems that the framers saw some merit in the argument related to communal hatred and in the "Interim Report of the Advisory Committee on Fundamental Rights" one could find the mention of "blasphemy" as one of the provisos. However, in the Drafting stage, when the provisos reappeared (after it was dropped by Sardar Patel

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300 Mookherjee was a Hindu nationalist who founded the Jana Sangh, the predecessor of BJP (Bhartiya Janata Party).

301 Rao, *Framing of India's Constitution*, 157.

302 Chand was a retired judge of the High Court who represented East Punjab in the Assembly.

303 H. C. Mookherjee was the Vice President of the Constituent Assembly. He was an educationalist and a prominent Christian leader of Congress Party from West Bengal.

304 As quoted in, Rao, *Framing of India's Constitution*, 231-2.

305 Ibid., 231.

during debates in the Assembly), the word "blasphemy" was found missing. Interestingly, there is no evidence of any opposition or protest against such move, neither within the drafting committee, nor during the debates of the assembly.[306]

A similar issue appeared when during the course of debate on the Draft Constitution, Mohd. Tahir[307] argued that invoking "communal passion" should be made an offence against which the state should have right to make laws to limit freedom of speech and expression. "Communal passion", according to him, included "agitating or exciting the minds of one community against the other." He pointed to the great "loss and disservice" that such offences had done to the country and to the neglect of such laws by the British as it served their interest. But after independence, he believed, such stringent laws were very important.[308] This initiative also found support among others like Syed Karimuddin[309] who argued that "whether Muslims are responsible or the Hindus are responsible for communal passions it has eaten away everything that is good in society."[310] Hence, he maintained that inciting communal passion in any form should be made an offence. This concern was reflected in the amendment suggesting the inclusion of "inciting communal passion" as a proviso to restrict free.[311] This amendment was vociferously opposed by members like M.A. Ayyangar[312] who argued that there were already laws under IPC to deal with such issues and hence such inclusions were not required.[313] The amendment was put to vote and was eventually defeated.

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306 It is significant that the Minutes of the Drafting Committee did not record the discussions which took place, but only recorded the conclusions of each meeting. However, there is no trace of any such protest even during the discussions on the draft constitution in the Assembly, which makes the case more curious.

307 Tahir was a Muslim representative from Bihar.

308 CAD VII, 742.

309 Karimuddin was a famous Criminal Lawyer and a Congress member from Central Province.

310 CAD VII, 757.

311 Amendment No. 477 placed on the floor of the house on December 2, 1948. For details see, CAD VII.

312 Ayyangar was a lawyer representing Madras Presidency and became the first Deputy Speaker and later the Speaker of the Lok Sabha.

313 Ayyangar, CAD VII.

The demand for making "promotion of communal hatred" or incitement of "communal passion" as a proviso to limit freedom of expression was based on the premise that Indian citizens could easily be misguided by communal elements, and therefore the state needed to step in more prominently to protect them from such propaganda. Though incitement of communal passion or promotion of communal hatred did not form a part of the caveats introduced under article 19(2), it was primarily because the law makers showered extensive faith on statutory laws like section 153(A) and 295(A), as credible tools in the hands of the officials to deal with situations, where communal hatred was being promoted. It not only hinted at their support to the statutory laws (which had colonial origins), but also gave a sense that they wanted the officials to use it extensively, in order to suppress fissiparous tendencies among some Indians to incite communal hatred.

Looking at the final draft one can say that the opponents of the provisos failed in their efforts because not only were the provisos entered, the final clause were vague in its content and intent, which made it open to misuse and misinterpretations by different parties. It was also clear that the lawmakers thought that though freedom of speech and expression was important, its misuse for communal polarisation that led to violence was detrimental to social harmony and hence it was necessary to curb it. A broad consensus was reached that in the interest of national integration freedom of speech and expression should carry important provisos which significantly limited its scope in practice. It now remained upon the courts, to protect the fundamental rights of citizens from any form of intrusions by either the state or the society.

4. The Constitutional Amendments and other Legal Apparatuses

Within a few months of its introduction, the judiciary and the parliament were at loggerheads over the interpretation of the constitution. Both these institutions seemed to have diverse views regarding some key constitutional aspects. It was felt that political stability and national integrity was in conflict with the democratic rights to freedom of expression and personal liberty. Responding to the situation, Nehru's government introduced the First Amendment Bill in 1951. The situation arose primarily because of

decisions of courts in the *Crossroads* case[314], *Shailabala Devi* case[315], and *Brij Bhushan* case[316]. In each of these cases the state governments took action under some version of "Public Safety Act", and each defendant turned for protection to the first clause of article 19. In *Crossroads* case, dangers of the "communist threat" were used by the government to justify press censorship and laws of Preventive Detention against Romesh Thapar, the editor of the communist mouthpiece. The Patna High Court in *Shailabala Devi* case rejected the contention that the pamphlet incited violence and Supreme Court unanimously upheld this judgement. In East Punjab, Public Safety Act, 1950, was struck down by Supreme Court on the grounds that pre-censorship restricted liberty of press. The laws were all struck down on grounds of "over-breadth" – the courts claimed that their ambit was much greater than the exceptions provided within article 19(2).

This led to wide ranging political reactions, some of which were particularly significant. Sardar Patel thought that the *Crossroads* decision knocked "the bottom out of most of our penal laws for the control and regulation of the press."[317] Ambedkar, the erstwhile Chairman of the Drafting Committee, and Law Minister at the time of the First Amendment Bill, commented that the Supreme Court had decided the issue incorrectly.[318] Central to Nehru's arguments regarding amendment to article 19 was his unease with some of the press which according to him seemed irresponsible "some two page news-sheet… full of vulgarity, indecency and falsehood."[319] New provisos in the form of "public order" and "incitement to an offence" were added as Nehru maintained

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314 Romesh Thapar vs State of Madras, (1950) AIR 37.

315 State of Bihar vs Shailabal Devi, (1952) AIR 329.

316 Brij Bhushan vs State of Delhi, (1950) AIR 37.

317 See, Patel-Nehru letter dated July 3, 1950 in, Vallabhbhai Patel, *Sardar Patel's Correspondence*, vol. 10, ed. Durga Das (Ahmedabad: Navjivan Publishing House, 1972), 358.

318 See *Parliamentary Debates*, Vol. XII (henceforth to be called PD and all references in this chapter belong to same volume, so only column number will be mentioned), part 2, 17 May 1951, 90067.

319 See, "Statements of Objects and Reasons," appended to the Constitution (First Amendment) Act, 1951.

that a constitution should not limit the "power of the Parliament to face a situation."[320] The "concept of individual freedom has to be balanced with social freedom and the relations of the individual with the social groups", Nehru argued.[321]

The opposition to the amendments came from different directions. There were criticisms about the high handedness of the government thereby undermining the importance of freedom of speech and expression.[322] Questions were also raised about the timing of such introduction (just before general elections) and the technical subject about whether a Constituent Assembly (largely unelected) had such rights to introduce so significant amendment.[323]

However it was H.V. Kamath's[324] suggestion about the need to include "reasonable" as qualifying any restrictions on speech that attracted most attention.[325] Amidst a lot of pressure, both from the opposition and from within the cabinet (especially from the Law Ministry), Nehru agreed to include this proposal, but he was not very happy as he feared that such inclusion could invite each such case to go to the courts and hence more intervention of court in executive decisions.[326] Finally, the Assembly passed the bill by a vote of 228 to 20. It retroactively and prospectively empowered government to impose "reasonable restrictions" on the freedom of expression "in the interests of the security of the State (replacing the words 'tends to overthrow the state'), friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation, or incitement to an offence."[327] Other than broadening the scope for

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320 Ibid.

321 Ibid.

322 See, S. P. Mookherjee's comments in PD, 8838.

323 This point was raised by Kunzru and Mookherjee among others. Discussed in great details in Austin, *Working a Democratic Constitution*, 47.

324 Kamath was a Socialist leader representing All India Forward Bloc.

325 PD, 8913-24.

326 Nehru in a letter to T. T. Krishnamachari. See, Gopal, ed., *Selected Works*, vol. 1, part 1, 189.

327 See, Austin, *Working a Democratic Constitution*, 49.

government intervention, there were three important aspects in the debates: a) The First Amendment received, as expected, comparisons with the First Amendment in the US. It was pointed that while the First Amendment had extended individual rights, "our First Amendment did the opposite by curtailing individual freedom"[328]; b) there was pointed discussion and criticisms about the courts. Nehru charged the courts of practicing conservatism[329] and N. G. Ranga[330] extended the charge to the judges of the courts[331]. All the top leaders including Ambedkar, Patel and Rajagopalachari questioned the wisdom of the courts in interpreting the Constitution and argued that the amendment was necessary as such interpretations had been made possible because of the error in the founding of the Constitution itself; and c) the addition of "reasonable" to qualify the restrictions on freedom of expression was a significant move. It provided the judiciary with the test of "reasonableness" in order to assess whether the action of the executive in cases dealing with freedom of speech and expression were justifiable.

Significant transformation again occurred in 1963 when both external and internal situations forced another amendment of the Constitution. The threats emanating from Chinese invasion in North-East and concerns over the demands of regional autonomy reflected in Tara Singh's fast for Sikh state, and Dravida Munnetra Kazhagam (DMK) call for "Dravidanad" led to the Sixteenth Amendment to the Constitution which added that government might place restrictions on expression in the interest of "the sovereignty and integrity of India," the qualifier 'reasonable' remaining in place.[332] After all these changes, the Constitutional provision for Freedom of expression as it stands today reads as follows:

> 19(1) The citizens shall have the right-

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328 S. P. Mookherjee, PD, 8912-3.

329 Ibid., 8818.

330 Ranga was a popular farmer leader of the Congress Party.

331 PD, 8681.

332 Austin, *Working a Democratic Constitution*, 50.

(a) to freedom of speech and expression; and the proviso under 19 (2) reads:

> Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.[333]

5. The Amendment of the Statutory Laws and its Implication on Freedom of Speech and Expression

The challenges facing Indian society in its post independence phase forced the government of the day to relook into the existing statutory laws. The incidents of communal violence and the role of print media, especially vernacular press allowed interventions which ensured that the scope of sections 153(A) and 295(A) of IPC was significantly altered. The government wanted to curb the misuse of the capacity of the press to spread communal hatred, but the changes initiated were also going to affect pamphlets, tracts and books as the laws governing all these forms of publications remained the same. A strong will to introduce new changes to these laws was reflected as early as in 1956, when the controversy surrounding the publication of the book *Living Biographies of Religious Leaders* and the subsequent role of some sections of Urdu press in Uttar Pradesh led to communal riots in Aligarh and surrounding areas.[334]

The book *Living Biographies of Religious Leaders* was written by Henry Thomas and Dana Lee Thomas, and was originally published in the US. It was already in circulation when Bharatiya Vidya Bhawan, Delhi decided to reprint it.[335] The protests against the

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[333] Article 19(2) of the Constitution.

[334] In the following section I largely concentrate on the controversy around the book. For a detailed discussion about its repercussions on the riots see, Brass, *Production of Hindu-Muslim Violence*, 60-116.

[335] Bharatiya Vidya Bhawan is a central government funded organization founded in 1938 by K. M. Munshi, a popular Congress leader. See, "Stray Musings," *Times of India*, September 30, 1956.

book began in Aligarh with students of Aligarh Muslim University playing a pivotal role in organizing strikes and demonstrations.[336] It was argued that the book contained a chapter on Prophet Mohammed and it presented the Prophet in wrong light. The protests also targeted K. M. Munshi, who was then the Governor of UP and very closely associated with Bharatiya Vidya Bhawan as a founding member and one of the editors. Fearing scaling up of the controversy, the book was quickly withdrawn and Munshi also published an unconditional apology along with requests to the protestors to allow the matter to rest. [337] However, the controversy did not die down.[338] The offending passages from the book were reproduced in Urdu newspapers and these were distributed to mobilize Muslims against the attitude of Indian government in general and Munshi in particular. There were significant communal clashes in different parts of Uttar Pradesh.[339] The controversy further took an international dimension. The Hindu groups argued that the protesting Muslims were getting support from Pakistan as the Muslims organizations in Pakistan had voiced their support against the book and thereby the protestors were also referred as "anti-national elements."[340] The crisis was later resolved by the involvement and interventions by Zakir Hussain, the retiring Vice Chancellor of the Aligarh Muslim University, Maulana Azad, Education Minister and Nehru, the Prime Minister.[341]

The episode highlighted some deep concerns about the freedom of speech and expression and the question of religious offence. Most leaders criticized the manner in which Muslim demonstrations turned violent and a counter movement was launched by

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336 "Aligarh 'Varsity Demonstration: Condemnation by Govt.," *Times of India*, September 14, 1956.

337 "Mr. Munshi's Regret: Causing Hurt to Muslim feelings," *Times of India*, September 7, 1956.

338 Nehru wrote to the Chief Ministers: "There were reports being spread that in Aligarh Gita was desecrated which was wrong and led to mob violence", as quoted in, Nand Lal Gupta, *Jawaharlal Nehru on Communalism* (Delhi: Hope India, 2006), 273.

339 Brass, *Production of Hindu-Muslim Violence*, 60-116.

340 See, "Military Preparedness by India Suggested: Mr. Chatterjee's Address at Mahasabha Conference," *Times of India*, November 12, 1956; "Clenched Fist Shown at India: Karachi Protest against Book," *Times of India*, September 22, 1956.

341 "Protest Must Stop: Bhavan's Book," *Times of India*, October 3, 1956; "Agitation is Condemned," *Times of India*, October 7, 1956.

Hindus in north India.[342] Also an important issue of concern was the role of print media in promoting communalism with the objectionable portions of the book being reprinted by the vernacular press that further escalated the feeling of offence among the Muslims in those areas. Nehru in particular saw it as a major challenge to be strongly dealt with in future and was eager to come up with a legislation to prohibit such acts. He wrote to the Chief Ministers that if they were "convinced that a newspaper editor or any other individual has spread communal hatred or incited people to communal violence, we should arrest him and either proceed against him in a court of law or keep him under preventive detention."[343] In an attempt to devise a zero tolerance attitude for incitement of communal violence, Nehru also encouraged the executive to take direct action against such violators which could be seen as a dangerous step as there was every possibility that some official could misuse this power for political ends. In another letter addressed to the CMs Nehru wrote, "I have personally come to the conclusion that we must have fresh legislation to deal with the spread of communal hatred by newspapers, etc. I would confine this to offensive communal writings, and not extend it at all in the political or other fields."[344] The urgency expressed by Nehru reflects the impact the protests and the violence that followed had on national politics. Further, this attitude was also reflective of the understanding that amendment to the existing laws was warranted and if need be the political class was prepared to intervene in order to counter the threat of communal violence. Strong and wider laws was seen as an important tool in the hands of the state to maintain public tranquillity. The episode also had connotations for publications that were considered to be religiously offensive. It was clear that the book was already available in India much before the publishers decided to reprint the book, and the timing of the furore could therefore be questioned. But contrary to this, the government seemed to consider the removal of the book from public sphere as an easy and instant remedy to the hurt sentiments of the protesting Muslims. This approach of the state laid the foundation of a trend in future where the

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342 "Protest Must Stop: Bhavan's Book," *Times of India*, October 3, 1956.

343 See, Letter dated 29 September, 1956 in Jawaharlal Nehru, *Letters to Chief Ministers*, Vol. 4, ed. G. Parthasarty (New Delhi: Oxford University Press, 1990). Also see, "Special letter in addition to fortnightly letter" in page 447 of the same volume.

344 Ibid., 436.

claims of religious offence obtained a sense of legitimacy and the tendency to take to the streets against publications considered offensive became a legitimate democratic means to pulp such publications.

Though Nehru wanted to strengthen the statutory laws, in order to counter the tendency of spreading communal tension by means of vernacular press, the government did not initiate any legislation in this regard. Things however changed in 1961. The recurrence of communal violence in different parts of the country, and particularly in Assam and Jabalpur, forced the Nehru government to form a special committee under Indira Gandhi to study the causes of such incidents and the strategies to counter it. The committee recommended important changes in statutory laws including section 153(A) and Section 295(A) of the IPC. These recommendations were further approved by the conference of chief ministers, a forum that took shape of National Integration Council in 1962. Based on the suggestions from both these groups, the government introduced a bill in the Parliament which later became Act XLI of 1961.

The bill was introduced in the Lok Sabha on August 11, 1961 by Home Minister Lal Bahadur Shastri as "The Indian Penal Code Amendment Bill, 1961" and a detailed discussion took place in the house on 30th August after the bill returned from the Select Committee stage. The debate in both the houses of Parliament reflected similar concerns about the scope of the amendment, the fear of misuse of extended power by the executive and the attack on freedom of speech and expression. While initiating the debate Minister of State at the Ministry of Home Affairs, Mr. Dattar stressed that the amendment was being introduced as a constructive step in order to assure "the integration of the nation in the fullest sense of the term"[345] by preventing "fissiparous tendencies within different religious and other groups that impact the peace in which all religions stay together."[346]

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345 See Lok Sabha Debates (New Delhi: Lok Sabha Secretariat, 2000), available at Parliament Library, New Delhi (Henceforth be called LSD and only date and column number will be mentioned). Dattar, LSD, August 30, 1961, 5884.

346 See Rajya Sabha Debates (New Delhi: Rajya Sabha Secretariat, 2006), available at Parliament Library, New Delhi (Henceforth be called RSD and only date and column number will be mentioned). RSD, September 4, 1961, 2030.

The amendment proposed some significant changes in the statutory laws especially section 153(A) of the IPC. Firstly, it made the grounds of conviction explicit in sections 153(A) by allowing punishment for the acts that "promote or attempt to promote feelings of enmity or hatred" on grounds of "religion, race, place of birth, residence, language." Further, it proposed to increase the quantum of punishment under section 153(A) and section 295(A) IPC from two to three years. It also proposed to insert an additional clause (c) to section 153(A) which made punishable any act that was "prejudicial to the maintenance of harmony between different religion, racial or language groups or castes or communities and which disturbs or is likely to disturb the public tranquillity."[347] But the most fundamental change was the removal of the explanation that was associated with section 153(A) since its inception as a colonial law in 1898. The explanation said: "It does not amount to an offence within the meaning of this section to point out *without malicious intentions* and with an honest view to their removal, matters which are producing or have a tendency to produce, feelings of enmity or hatred between different classes of citizens." This explanation put the onus of proving malicious intentions on the prosecutor. However, its removal meant that the responsibility to prove innocence would completely fall on the person charged with the crime.[348]

The debate over the bill in both houses of Parliament centred around a set of issues which were very similar to the ones raised during colonial period when these laws were inserted to the penal codes. The opposition to the respective bills were also based on similar grounds. The opposition charge was led by Jan Sangh leader and future Prime Minister of India Atal Bihari Vajpayee in Lok Sabha and Communist leader Bhupesh Gupta in Rajya Sabha who demanded that the bill should be sent for wider consultation and public opinion be sought before inserting amendments. Vajpayee claimed that the exercise would not only be representative of the true democratic process but also "help

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[347] LSD, August 30, 1961, 5884.

[348] This position was justified by Home Minister Lal Bahadur Shastri in his closing speech on the subject. He said, "our intention in omitting the explanation is with a view to cast responsibility on the offender to prove that his intentions were not malafide or malicious." LSD, August30, 1961, 6220.

in educate and train people to national integration."[349] But the demand to send the bill for wider consultation was defeated in the house by an overwhelming majority of 116 votes against 22 as it was seen as a delaying tactics on the part of the opposition.

One of the foremost arguments against the bill was that the already existing laws were potent enough and there was no need for fresh amendments. Krishnaswamy[350] and M. S. Aney[351] in the Lok Sabha, argued that the step showed the failure of the government to use the available laws properly. Krishnaswamy also pointed that the new law would be counter-effective as it would only ensure that the oppositional and disintegrative forces go underground and thereby it did not provide a good solution to the problem of communalism.[352] There were other opposition leaders who strictly rejected the need for any legislation of that sort. H. Hynniewta, an independent MP in Lok Sabha representing hill regions of Assam, along with others like Socialist leader Ramsevak Yadav, considered the bill as a threat to freedom of speech and expression as it widened the space for state interventions.[353] Similar views were put forward by Communist leader Bhupesh Gupta, and Republican Party of India MP B. D. Khobragade in the Rajya Sabha.[354] There was also a great opposition to the removal of the explanation from section 153(A) as it was believed that the change would make the law amenable to misuse and make it difficult to prove innocence in cases where the charges were falsely implicated. Leaders like Mahavir Tyagi[355] and Thakur Das Bhargava[356] were vehemently opposed to this move. They argued that the removal of "malicious

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349 LSD, August 30, 1961, 5900.

350 A. Krishnaswamy was an independent MP from Chingleput in Tamil Nadu. LSD, August 30, 1961, 5923-4.

351 Aney was a freedom fighter who became an Independent MP of Lok Sabha from Nagpur constituency. LSD, August 30, 1961, 6018.

352 LSD, August 30, 1961, 5924.

353 LSD, August 30, 1961, 5998. Similar view was also expressed by Socialist leader M. S. Gurupada Swamy, RSD, 3157-8.

354 LSD, August 30, 1961, 6217.

355 Mahavir Tyagi belonged to Congress Party.

356 Bhargava was a Congressman and extremely popular for his radical views against government policies.

intentions" from the necessary requirement to convict individuals under the law as contained in the explanation to section 153(A) would be a direct attack on freedom of expression.[357] Hridaynath Kunzru remarked: "We are now trying in the name of national integration to adopt a more stringent measure than Government considered it necessary to adopt during the war."[358] Similar attitude was reflected by All India Mahasabha Vice President, V. G. Deshpande who in a press conference on August 12, 1961 charged that the "section has become too wide in scope and will make innocent activities for social reform also a criminal offence."[359]

Countering these opinions, the Congress Party was well armed with the justifications and the need for the amendments. The foremost justification extended in support of the amendments was that it was required to protect the secular character of the Indian polity. Congress members like Raghubir Sahai and Sriram Sahay argued that it was necessitated because of the activities of the communal parties which tried to polarize votes by invoking religious contentions.[360] Santosh Kumar Basu, Congress MP from West Bengal along with other members like Kasliwal and Akbar Ali Khan argued that the government needed such laws in order arm itself up to curb the intentions of communal parties of all hues.[361] Khan even recommended that the guilty should not just be jailed but be hanged.[362] The reply to the opposition was led by the Minister of Home Affairs Lal Bhadur Shastri who defended his government's position aggressively. He not only rejected the need for circulation but also argued that unlike the opposition's claims section 153(A) was being made more pointed and grounded according to the need of the time.[363] On the subject of removal of the explanations he argued that the

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357 Tyagi, LSD, August 30, 1961, 5937-40; Bhargava, LSD, August 30, 1961, 5945.

358 RSD, September 5, 1961, 3166.

359 As quoted from the press conference in "Redrafting of Bill urged," *Times of India*, August 13, 1961.

360 See, Raghubir Sahay, LSD, August 30, 1961, 5968; Sriram Sahay, RSD, September 5, 1961, 3168.

361 S.K. Basu, RSD, September 5, 1961, 3194; Kasliwal, LSD, August 30, 1961, 5922; Khan (Andhra Pradesh), RSD, September 5, 1961, 3174.

362 RSD, September 5, 1961, 3174.

363 LSD, August 30, 1961, 6218.

onus to prove that the intention of the accused was neither malafide nor malicious should be the responsibility of the accused and not the prosecutor else it was very difficult for the executive to act even in most disastrous situations. The explanations, he remarked, gave an undue advantage to the accused.[364] The overwhelming presence of Congress members in both houses of Parliament ensured that the bill was passed without any difficulty.

As is visible, the overall debate in both houses of the Parliament concentrated on issues of communal violence and the role of press. The question of freedom of expression remained important but was overshadowed by the harms that an excess of it had caused to the society. The need of the hour, it was widely acknowledged, was to curb such liberty to promote values of "national integration" and "toleration."[365] Though the question of religious offense did not figure at all in the debates, there were clear signs that the legislation was going to have serious ramifications on the subject. So, any form of publication which could incite religious passions could face punitive action. Further the amendment to section 153(A) also meant, that the scope of preventive laws under section 99 of CrPC, were also widened and hence any such publication could also be proscribed without any consideration about the intentions of the author. Furthermore, the way in which the government introduced the amendments in response to communal violence in different areas meant that strengthening of the laws was seen as an important and easily available remedy to counter such attempts. It was overlooked, however, that these changes would have long term repercussions on the freedom of speech and expression and its impact would not be limited to communal press but could also affect other mediums of expression. The Congress members like S.S.N. Tankha insisted that the Parliament should have faith in the elected government that the laws would not be misused,[366] but in practise it was no guarantee to the way in which the executive would translate and use such powers in its dealing with contentious subjects like publications which were claimed to be religiously offensive. At the least, an

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[364] Ibid., 6220.

[365] See, Dattar, LSD, August 30, 1961, 5884.

[366] RSD, September 5, 1961, 31748-9.

increase in the scope of sections 153(A) and 295(A) meant a direct attack on the scope of freedom of speech and expression, a relation that most of the law makers overlooked considering it to be a necessary step to curb tendencies of communal disturbances.

Similarly in 1968, after a series of communal riots, most significantly in Srinagar, Ranchi and Aurangabad, the National Integration Council recommended further amendments to these laws and these recommendations were readily accepted by the government.[367] Following this, the government introduced "The Criminal and Election Laws Amendment Act, 1969" in the Parliament which became Act XXXV of 1969. While introducing the bill in the Rajya Sabha, Vidya Charan Shukla, Minister of Home Affairs pronounced that the aim of the legislation was to counter the "growing trends of communalism, factionalism and regionalism" in the country.[368] He specified the role of communal press in disturbing peace and harmony of the country and inciting religious hatred among common people who get easily swayed by such propaganda material.[369] He specifically accused the RSS mouthpiece, *Organizer*, and journals like *Mother India,* in misguiding citizens on communal lines.[370] The most significant amendments that the bill proposed to undertake in relation to freedom of speech and expression included: a) The scope for intervention of the executive under section 153(A) was enlarged. So unlike earlier, when promoting feelings of enmity or hatred were punishable, promotion of "disharmony" and "ill-will" was also added as eligible for conviction. However, the terms like "disharmony" and "ill-will" remained undefined and also there was no discussion about what parameters would be used to judge a particular publication's capacity to promote "disharmony" or "ill-will" among different communities; b) Along with the change in the scope of 153(A), section 196 of CrPC was also amended whereby the offence under section 153(A) was made cognizable and

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[367] See, "Delhi approves Legislation to end Communalism; Measures suggested by Home Ministry," *Times of India*, July 3, 1968; "Communal Riots: Preventive steps favoured," *Times of India*, June 23, 1968. The recommendations were based on a report prepared by the Sub-committee headed by Andhra Pradesh CM K. B. Reddy.

[368] RSD, August 28, 1969, 5482.

[369] Ibid., 5483.

[370] Ibid., 5483.

unlike earlier, the District Magistrate could act *suo motu* in such cases without permission of the state government or any court. As Shukla claimed on the floor of the house, the District Magistrate could now directly take cognizance of such inflammable matters to "not only stop that sort of writing, but also seize the printing press."[371] It is explicit that both these measures were detrimental to the scope of freedom of speech and expression as it increased the space for subjectivity in executive action. The amendments only made the laws more prone to subjective intervention and hence available for misuse by the executive.

As in the case of amendments in 1961, the debates in both houses of the Parliament revolved around the issue of communal violence. The opposition concentrated on highlighting the failures of the Congress government in stopping communal riots. It was claimed that the statutory laws, if used properly had enough scope to deal with the situation and that there was no need to increase it further. It was maintained that the continuing spree of communal violence was representative of the inability of the government and not the inefficiency of the laws.[372] The Jan Sangh leaders accused the government of practising pseudo-secularism and argued that it had failed to inculcate the values of "toleration" and "national integration" among the citizens.[373] The Communists and Socialists doubted the intentions of the government in widening the powers of local authorities.[374] On the contrary, the Congress members and other supporters of the bill defended the step of the government by citing the NIC recommendations.[375] They criticized the politics of communal parties like Jana Sangh and Muslim League in religious polarization and pointed the role of press in corrupting

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371 Ibid., 5484.

372 See, B. N. Mandal, RSD, August 25, 1969, 5484; S. K. Vaishampayan, RSD, August 25, 1969, 5490; Niren Ghosh, RSD, August 25, 1969, 5511; Z. A. Ahmad, RSD, August 25, 1969, 5484.

373 See for example, Niranjan Verma, RSD, August 25, 1969, 5505-07.

374 See, Niren Ghosh, RSD, August 25, 1969, 5511; Z. A. Ahmad, RSD, August 25, 1969, 5484; Rajnarain, RSD, August 25, 1969, 5777-83.

375 See for example Congress member Abid Ali representing Maharastra in Rajya Sabha, RSD, August 25, 1969, 5516-19; Forward Bloc member Sheel Bhadra Yajee, RSD, August 25, 1969, 5506-11.

the minds of vulnerable masses that fall prey to the political propaganda of these right wing political parties.[376]

The subject of freedom of speech and expression remained largely absent in these debates. Among all the participants in the debates in both houses of the Parliament, the only member who raised the issue of freedom of speech and expression extensively was Pranab Kumar Mukherjee, a Congress Party member and first time MP of Rajya Sabha representing West Bengal. Though Mukherjee supported the bill, he raised serious issues about the attitude of politicians regarding freedom of expression. He remarked:

> Whatever be our feelings about any particular journal, whatever be our feelings about any particular press, whatever be our sentiments about the opinions expressed in a publication, we cannot advocate on the floor of the house that the freedom of the press be curtailed.[377]

He was critical about any attempt by the government to curtail the freedom of press and though he belonged to the ruling party, he raised doubts about the future of freedom of expression if the power of the executive was increased. He said:

> If we want to curtail the freedom of the press only from the view of stopping communalism, it will not stop there. If we give this power to the government of India, give this into the hands of the bureaucrats, they will control them and will say what should appear. It will not stop there, will go further. So, I think there should not be that power which can control the press.[378]

He raised objections with clause 6 of the bill which maintained that freedom of expression could be restricted for maintaining communal harmony. According to him

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376 Yajee, RSD, August 25, 1969, 5506-11; Shukla, RSD, August 25, 1969, 5483-4.

377 RSD, August 25, 1969, 5548.

378 Ibid., 5548.

eight exceptions were mentioned in article 19(2) of the constitution and maintenance of communal harmony did not figure there and therefore he was not sure if the bill itself was in accordance with the spirit of the constitution.[379] Mukherjee asked pointed and pertinent questions regarding the constitutionality of the bill as well as on the subject of freedom of expression. Unfortunately when the concerned minister, Vidya Charan Shukla delivered the final comments on the bill, he continued his attack on leaders belonging to the Jana Sangh as well as the Communist and Socialist parties, but he evaded throughout his speech any discussion about the probable impact of the bill on the scope of freedom of speech and expression. Mukherjee's name or concerns raised by him did not even appear in the speech of Shukla. The context of communal violence trumped any concern for freedom of speech and expression and as in 1961, the amendments to statutory laws in 1968, was dominated by the aim of the government to control communal press from inciting and spreading communal hatred. It resulted in further strengthening the hands of the executive by widening the scope of statutory laws.

6. Attitude of the Lawmakers towards Freedom of Speech and Expression in Independent India

Two aspects dominated the attitude of lawmakers in the debates of parliament, during the amendments of constitution and the statutory laws. The first was the sense of urgency, and the second was the sense of paternalism reflected by the lawmakers. The urgency of the context – communal violence and the role of press in it – guided these debates. In order to respond to the threats of communal violence, the lawmakers concentrated on enlarging the space for executive action. Though a constitutional right, freedom of speech and expression was considered a threat for maintenance of communal and social harmony. The sense of urgency is reflected throughout the debates, where leaders consistently argued for the need of making laws more stringent

[379] Ibid., 5549.

in order to strengthen the process of "national integration" by curtailing "fissiparous tendencies," and enforcing "toleration" and "communal harmony" among the citizens through fear of punishment for deviants. In order to curb the capacity of communal press in the context of disturbed communal context, it was overlooked that an amendment to the law would not only affect newsprints, but would be detrimental to all forms of expression, and the increased scope for applicability of such laws ensured that the right to freedom of speech and expression would remain conditional on what the executive thought was permissible within the law.

The debates also reflected another important aspect in the attitude of the lawmakers i.e. the sense of paternalism. Repeated concern was raised about the vulnerability of Indian citizens and how they were being easily misguided by the communal press. For example, during the debates over first amendment, it was argued that most Indians were "ignorant and illiterate," and therefore "easy to mislead."[380] When the opposition criticized the government citing examples from other democracies, it was held that other countries had a long tradition in freedom, and that had "instilled discipline and restraint" in them.[381] It was also argued that Indians "respond to incitement easily," unlike citizens of other countries, and therefore the comparison was faulty.[382] Similarly, while introducing the amendment to the statutory laws, B. N. Dattar, the then Minister of Home Affairs claimed that the bill was aimed to contain "fissiparous tendencies" and was required because "each man often times here and there thinks more of his religion... than common binding links of the Indian society."[383] It was therefore considered as the duty of the government, to protect the citizens from the impact of communal press that was misguiding them. The above discussions reflect that in the context of urgency, the attitude of the lawmakers was paternalistc and reactionary, and a debate about the

[380] Bhargava, PD, May 30, 1951, 9717.

[381] Ibid.

[382] Rev. D'Souza, PD, May 30, 1951, Part 2, 9692.

[383] RSD, September 4, 1961, 3019-20.

ramifications of the proposed changes to law on fundamental right to freedom of speech and expression was avoided.

7. Conclusion

In the Indian case, the right to freedom of speech and expression was considered a natural ally to independence and therefore its inclusion in the constitution as a fundamental right was neither doubted nor debated. In the process, an opportunity was lost to seriously reflect about its importance, and the role it could play in making Indian democracy more vibrant. Rather, the need for national unity and public order motivated the constitution makers to severely limit its scope. Uday Singh Mehta has very well presented the situation as an irony "that the successful culmination to free oneself from imperial subjection led almost immediately to freedom itself becoming a subsidiary concern; that is subsidiary to national unity, social uplift, and a concern with recognition."[384] But for the constitution makers, it was not an irony, rather an "ideal" produced under compulsion of the complex context in which they were operating.

The Constituent Assembly faced the classic dilemma of how to preserve individual freedom, while promoting the public good.[385] It attempted to create a happy marriage between different ideal values, overlooking the possibilities of clashes among them. The debates that followed reflected three important strands: a) the idea of liberty, though important, was seen as subsidiary to the promises of social equality and the need for fraternity. So although important freedoms were included as fundamental rights, they were accompanied with caveats that made space for state intervention; b) there was an attempt to balance individual rights with community/group rights, but as was visible, in relation to freedom of speech and expression, it further increased the ambiguity of state intervention, as it did not say anything about the situation when both these aspects could clash; and c) though the assembly did not approve the inclusion of "communal

[384] Mehta, "Constitutionalism," 17.

[385] See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (New Delhi: Oxford University Press, 1999), 50.

hatred" as a proviso for state intervention, it was not because they did not recognize it as a threat, but because they believed that other laws especially under IPC were enough to deal with such issues. These strands made space for state intervention from three directions: firstly, through the constitutional provisions whereby laws could be made to limit freedom of speech and expression; secondly, through the ambivalence created by not considering the situation where individual and group rights might clash in the form of potential contradiction which were yet undeveloped; and thirdly, the recognition of criminal laws as a deterrent to excesses of free speech, which incidentally, were to be imported as formulated during British rule.

Soon after its formulation, the constitution faced newer contradictions, resulting in its amendment. However, again rather than engaging in a debate about the prospects of free speech, it was posed as a threat to state capacity and hence resulted in increased powers to the state against such freedom. It can be said that different contexts call for different ways of treating the issues of rights and liberties, and it is often depended on the socio-cultural and political contexts. Some scholars have pointed at the "paradox of constitutional democracy" which assumes a strange merger of "constitution" and "democracy," which often stand for contradictory values and ideals.[386] Habermas has argued that such paradox can only be settled if we try to understand the principle of "co-originality"- that private and public autonomy require each other. The argument is not therefore that there should, or should not be limitations, rather it is about the kind of limitations forwarded and whether it improves the space for liberty or restricts it.[387] The laws in such cases should consider freedom at its core, which apparently did not happen during the CAD. The terms used to delimit the scope of freedom of speech and expression- libel, slander, defamation, contempt of court, decency, morality- are vague and uncertain, that there is every possibility for multiple interpretations. This not only invited state intervention, but increased the possibilities of its misuse. Adding to these

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386 See, Frank Michelman, "Constitutional Authorship," in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (New York: Cambridge University Press, 1998), 64–98; Also see his review of Jurgen Habermas', "Between Facts and Norms," *Journal of Philosophy* 93, no. 6 (1996), 307–15.

387 Jurgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles," trans. William Rehg, *Political Theory* 29, no. 6 (2001), 767.

were the already existing and newly developed legal instruments, be it either in the form of IPC, CrPC or the state based laws which did not only severely limit, but also introduced similar ambiguities about the scope of free speech as experienced during colonial times.

The attitude of law makers and executive towards freedom of speech and expression has also been a matter of concern. The way in which it is juxtaposed to maintenance of social harmony has reduced the space, both legal as well as substantive, of this right. As the debates in both houses of Parliament showed during the amendment to penal codes in 1961 and 1969 showed, the lawmakers were not interested in discussing the issues of freedom of expression, and even in cases where the concerns were raised, it attracted little attention due to the context in which the legislations were introduced. The series of communal violence, and the role of press in escalating polarization, convinced the legislators that freedom of speech and expression needed to be curbed. However, the repercussions of the amendments were largely overlooked, as it affected not only the communal press, but also other forms of expressions like books etc. Also, an increase in the powers of the executive to act upon such laws meant that the space for freedom of speech and expression was further left conditional, to the prerogative of the administrators. Two conclusions can be drawn from such exercise: a) freedom of speech and expression as a fundamental right did not enjoy any significant status in India. It was allowed with several caveats that defined its scope; b) The political class was insistent in allowing greater space for government intervention in free exercise of freedom of speech and expression. It was believed that on the one hand, it was the responsibility of the government to maintain communal harmony and social cohesion, and therefore, the need to balance freedom of expression with such challenges; on the other hand, it was considered the duty of the government to adopt a paternalistic role to inculcate values of national integration and toleration, among its citizens, and therefore there was the need to allow excessive powers under its command on contentious subjects like freedom of speech and expression.

CHAPTER 4

PREVENTING RELIGIOUS OFFENSE: LAW, COURTS AND "REASONABLE" RESTRICTIONS TO FREEDOM OF SPEECH AND EXPRESSION

1. Introduction

In the last chapter I discussed the role of law makers in shaping the legal provisions that govern the claims of right to freedom of speech and expression. The overall analysis was based on a review of the debates in the legislature, where important interventions marked the scope and limitations of this fundamental right. For this purpose I examined important moments like the discussions in the Constituent Assembly during the making of the constitution as well as its first amendment and later amendments of the statutory laws like section 153(A) and 295(A) in 1961 and 1969. I showed that in each case the lawmakers were responding to some emergent situation with the belief that redefining the laws would strengthen the executive to deal with challenges to law and order posed by press or publications either aimed at religious defamation or promoting hatred among different religious groups. I argued that in an attempt to balance freedom of expression with the concern for social cohesion and communal harmony, the law makers introduced provisions which significantly limited the scope of freedom of expression and the ambiguity in defining the limits of the right allowed for executive overindulgence. An overlapping consensus was reached that restrictions were justified in order to contain the misuse of freedom of speech and expression. At the same time it was left upon the courts to determine if the action of the government could legally fall under the category of "reasonable restrictions" as defined under the constitution.

Some commentators have argued that "unlike most western democracies, liberty was neither a political nor a primary social norm" for the post-independence Indian State.[388]

[388] Mahajan, *Identities and Rights*, 158; Also see, Mehta, "Constitutionalism," 17-18. For an analysis based on the study of practice of censorship in post-colonial India see, Bhowmik, *Cinema and Censorship*.

As discussed in the last chapter, one of the primary challenges before the newly formed state was to balance competing claims of liberty and social tranquillity, and as a response, it endorsed the restrictions on individual freedoms. In fact the concern for public order "tilted the balance in favour of policing rather than civil liberties,"[389] whereby the state used its executive powers extensively to curtail fundamental rights like freedom of speech and expression in the pretext of public interest. It made the role of the courts as defender of citizen's fundamental rights especially significant in the post-independence period. In this chapter, I examine the role of the courts particularly in relation to the claims of religious offence. Commentators have convincingly shown that government's decision to curb freedom of speech is guided both by the real and imaginary fear of threat to public order, as well as the pressure exerted by socio-religious groups so that "social censorship" comes to be linked with "state censorship."[390] As the final arbitrator of law, the courts in India have the power to define the scope of freedom of speech and expression, and under the reviewing authority assigned by the constitution the courts can also check the arbitrary actions of the government.[391] If that is the case, how do the courts respond to the competing claims of freedom of expression and religious offence in order to judge whether government's action is justified under the provisions of "reasonable restriction?"

Legal practitioners and scholars like Soli J. Sorabjee[392] and Rajeev Dhavan[393] have argued that though some High Courts are more prone to allow restriction of freedom

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389 Mahajan, *Identities and Rights*, 161; also see Sorabjee, *Law of Press Censorship*.

390 Dhavan, *Publish and be Damned*, 151; also see, Venkat Eswaran, "Advocacy of National, Racial and Religious hatred: The Indian Experience," in *Striking a Balance: Hate Speech, Freedom of Expression and Non- discrimination,* ed. Sandra Colliver (Human Rights Centre, University of Essex: Article 19, International Centre Against Censorship, 1992), 159- 170.

391 As Samuel Walker has shown, in the case of US, the courts played a defining role in determining the scope of freedom of speech. Though the laws in India do not allow the same liberty to the courts, its role is still very significant. The courts in India are expected to limit their role to checking whether the state action is based on procedure set by law rather than the "due process" doctrine followed by American courts. For a reference to the role of US Supreme Court see, Walker, *Hate Speech*.

392 Soli J. Sorabjee, "Freedom of Expression and Censorship: Some aspects of the Indian Experience," *Northern Ireland Legal Quarterly* 45, no. 4 (1994), 327-42.

393 Dhavan, *Publish and be Damned*.

of speech on the pretext of "offence" and threat to public order, the Supreme Court generally maintains wide protection in its favour. Ratna Kapur[394], based on her study of case laws, has held that there is no evidence of "either an overuse of the provisions or a judicial abuse of the power of censorship" on the part of the courts. In fact, she argues, the courts have done an excellent job of protecting minority groups from hatred of the Hindu Right, which according to her was an important objective of India's hate speech laws. Contrary to this opinion, however, Pratap Bhanu Mehta[395] has claimed that the laws on the subject are so ambiguous that the courts often seem to be upholding any form of censorship by the government, particularly in relation to religiously contentious speech acts, either due to the presumed threat to public order or based on its effect on the religious sensibilities of the followers within the community in question.

In this chapter, I engage with these interpretations based on my study of court cases involving religiously offensive publications. In the first section of the chapter, I discuss the idea of religious offence in order to explain what is at stake. The aim is also to highlight the contemporary debates on the issue and put India's statutory laws in perspective. I argue that the Indian laws on the subject are ambiguous and open for subjective interpretations. The courts have held that the claims of religious offense are very sensitive and need to be balanced with the right to freedom of speech and expression. However, courts' judgments and observations in different cases do appear to hint a tilt in favour of the "offended." This is because the courts define "religious offense" very expansively and consider the suppression of publications containing defamation of religion or promoting religious hatred as important. In the second section, I demonstrate how the courts allow a preference for suppressing contentious publications based on their interpretations of the statutory laws. I show this through a discussion about the "manner-matter debate," as well as the distinction maintained by the courts between "punitive" and

394 Kapoor, "Who Draws the Line?" 15-30.

395 Mehta, "Passion and Constraint", 311-338.

"preventive" laws. I argue that though the courts do not explicitly support a "right not to be offended," the consequentialist approach that the courts employ to interpret laws in this regard does serve to justify wide latitude for government's intervention in favour of censorship. In the third section, I discuss why the courts treat the claim of religious offence with such importance that it often seems to trump over freedom of expression. This attitude of the court, as I shall show, flows from two central assumptions: a) the courts maintain that religiously offensive publications have a strong tendency to lead to public order problems and therefore government's action in this regard is often upheld; and b) the courts believe that the secular state in India is obligated to protect the right to religion and conscience and is further expected to create conditions whereby this right can be freely exercised. So, if need be, government can curtail freedom of expression in case it hinders the free exercise of freedom of religion. Based on these analyses, I argue that though the courts in India have been sensitive to the idea of freedom of speech and expression, the threat posed by religiously offensive publications has allowed the courts to define the statutory laws very broadly, and that the tilt is in favour of censorship and other forms of government interventions.

For analysis, I use cases both from the Supreme Court as well as different High Courts in India.[396] The High Court cases are significant because most of the controversies about contentious publications fall under the category of law and order subjects that are primarily dealt with by the High Courts. Few of these cases travel to the level of Supreme Court: only if the constitutionality of any statutory laws is challenged, or if review petitions against the decision of High Courts are filed, does the Supreme Court consider the case. More importantly, a review of Supreme Court cases reveals that many of these High Court judgments and observations of the judges play a guiding role in Supreme Court decisions and appear recurrently in the debates of the court room.

[396] I have used cases from High Courts across different states of the country depending upon the importance of such cases and whether they deal exactly with the subject under discussion here i.e. religiously offensive publications.

2. Religious Offense and Reasonable Restrictions to Freedom of Speech and Expression

According to the Oxford English Dictionary, "offence" means annoyance or resentment brought about by a perceived insult or disregard for oneself. The expression contains two aspects – an action and an effect. In the present dissertation, I use "offence" to refer to the hurt or wounded feelings produced, either voluntarily or involuntarily, by speech acts, most notably books and publications. In this context, the idea of "offence" also implies a relationship between two parties i.e. one who offends (who gives offence) and the offended (who takes offence). The one that gives offence can be either an individual or an object (in the present case books and other publications). At the same time, the offended can be an individual as well as a group (when the offence is experienced by many individuals from the same social group or community).[397] Religious offense, therefore, refers to the hurt generated to the religious sensibilities of individuals or groups, through the invocation of contentious religious subjects like defamation of religion or promoting hatred on the basis of religion. Considering that the injury is caused by speech acts, the subject under examination here is: when should law interfere, if at all, to regulate such speech acts in cases where religious offence is claimed?

There are several advocates of absolute and universal freedom of expression. Asserting this position in relation to religious offense, legal philosopher Ronald Dworkin opined that everyone had "the right to ridicule" and no one had the "right not to be insulted or offended."[398] He was against the idea that freedom of speech should have limits or that it ought to be balanced against any other good that society aspires to achieve, like the

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[397] Many scholars present 'offence' as a subjective experience. See, Stefan Collini, *That's Offensive: Criticism, Identity, Respect* (London: Seagull Books, 2010); Casper Melville, *Taking Offence* (London: Seagull Books, 2009). However recently scholars like Lorenz Langer have argued that though a subjective experience, it has the potential to mobilize similar experiences of hurt. See, Lorenz Langer, *Religious Offence and Human rights: The Implications of Defamation of Religions* (Cambridge: Cambridge University Press, 2014).

[398] Ronald Dworkin, "The Right to Ridicule." *The New York Review of Books*, March 23, 2006, http://www.nybooks.com/articles/2006/03/23/the-right-to-ridicule/.

virtues of multiculturalism. Dworkin's views were based on the basic principle of human dignity, whereby he argued that expressing attitudes, opinions, fears and even the libel, confirmed the speaker's standing as a responsible agent in collective action.[399] But Dworkin's position emphasized on the dignity of the "speaker" and did not take into consideration the dignity of its putative target, i.e. against whom the speech act was aimed.

Jeremy Waldron, for example, raised this issue and further maintained that "freedom from censorship of someone who uses 'hate speech' does not outweigh the freedom from defamation of his or her target."[400] Developing this approach Waldron provides a liberal defence to hate speech laws. But Waldron's use of "dignity" is very specific. He defines dignity as the confirmation of *equal membership* in a society – "basic social standing… as a proper object of society's protection and concern."[401] Waldron suggests that the concern for dignity should be distinguished from concern to avoid offense. He argues that the feeling of offense is highly subjective, and it is the "public nature of hate speech – in time, manner and place – that takes it outside the realm of offense of feelings."[402] The aim of hate speech laws, he contends, should not be to prevent people from being offended. As is visible, neither Dworkin nor Waldron support legal action against religiously offensive speech acts. Dworkin completely rejects any basis whatsoever to restrict freedom of speech, and Waldron's idea of "hate speech," though it allows some forms of restrictions, does not allow religious insults and offense as a valid and justifiable ground to restrict speech acts.

Perhaps one of the most significant and enduring contributors to the debate over validity of religious offense, as a cause for restrictions, was John Stuart Mill. Mill in his classic *On Liberty* devised, what is popularly known as the "harm principle." The

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399 Ronald Dworkin, forward to *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), VII- VIII.

400 Jeremy Waldron, "Dignity and Defamation: The visibility of Hate," *Harvard Law Review* 123, no. 7 (2010), 1596-1657.

401 Jeremy Waldron, *The Harm in Hate Speech* (London: Harvard University Press, 2012), 15.

402 Ibid., 106.

central tenet of Mill's idea is that "the only purpose power can be rightfully exercised over any member of any civilized community, against his will, is to prevent harm to others."[403] In case of speech acts, Mill would not support any action solely on the basis of the content of an opinion because he defended "fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered."[404] For him, the circumstances in which the opinion is expressed could only make a speech act punishable. Further, the harm produced in such cases had to be in immediate reaction to the speech act. The corn dealer example that Mill forwarded to explain his argument is also indicative of the difference he would place between "advocacy" and "instigation." For example, Mill argued that it was acceptable if someone advocated through print that the corn dealer starved the poor. But when the same view is expressed in front of an angry mob standing outside a corn dealers' home, it can lead to violence and hence harm to the dealer. In this case there appears to be a direct link between the idea advocated and the action of the mob, and hence the speech act was punishable. According to Mill, a speech act is only punishable if it is in the form of instigation and results in an "overt act" and "at least a probable connection can be established between the act and instigation."[405] However, "instigation" is different from "advocacy" in that in the case of "instigation" there is a direct urge to action and the action follows immediately. So, for Mill, even a religiously offensive speech act could only be punished if it was in the form of "instigation," which means defamation of religion would not constitute a valid crime and could only be punished if, for example, it promotes hatred among the witness and instigates them to harm others as a result. Religiously offensive publications in the form of books or printed articles would, similarly escape punishment according to Mill's standards.

Some critiques feel that Mill's consequentialist argument set the bar too high and if this principle was taken seriously, it will be difficult to constrain any form of speech. Joel Fienberg, for example, argued that there were human experiences that might be

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403 Mill, *On Liberty*, 9.

404 Ibid., 106.

405 Ibid., 107.

"harmless" but still so unpleasant that a demand for legal protection against them would be justified even if it is at the cost of an individual's liberty.[406] Therefore, Fienberg formulated the "offense principle." The basic assumption is that offence is less serious than harm and the offended mental state is a condition different from harm. According to Feinberg "offense" takes place when: a) one suffers a disliked or unpleasant state; and b) one attributes that state to wrongful conduct of another; and c) one resents the other for his role in causing to be in the state.[407] However, Feinberg was very clear that not all such claims could be legally protected at the cost of freedom of speech. Therefore he derived certain standards for analysing whether an action in this regard was warranted or could be justified as reasonable. These standards included: a) the "extent of offense" standard- in order to allow consideration of the intensity and durability of repugnance produced; b) the "reasonable avoidability" standard- to check whether the offensive displays could be easily avoided by the subject; and c) the "volenti" standards- to assess whether or not the witness has willingly assumed the risk of being offended.[408] For Feinberg, an action against a speech act could only be justifiable if the witness had to face it involuntarily and was in such a position that there was no way in which the displays could be avoided and the "offense" produced by the display was deeply hurting. This scale could be useful for all kind of offense, including that caused by religiously injurious speech.[409] Feinberg held that the offense principle is dependent on "cultural standards" that vary greatly from place to place, and within each nation "constantly and rapidly change."[410] This stress on context-based analysis of the

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406 This idea was first put forward by Joel Feinberg in, "'Harmless Immoralities' and Offensive Nuisances: Reply," in *Issues in Law and Morality*, ed. Norman S. Care and Thomas K. Trelogan (Cleveland and London: Case Western Reserve University Press, 1973). Later it was further developed in Joel Feinberg, *Offense to Others* (New York: Oxford University Press, 1985), 1.

407 Ibid., 1-2.

408 Ibid., 26-27.

409 See, Raphael Cohen-Almagor, *The scope of Tolerance: Studies on the Cost of Freedom of Expression and Freedom of the Press* (Abingdon: Routledge, 2005), 107. Cohen-Almagor argues that "the offence to sensibilities argument in and of itself can serve as grounds for restricting freedom of expression in extreme cases when the offense is severe and the target group cannot avoid being exposed to the offence."

410 Feinberg, *Offense to Others*, 47.

need and nature of law is also supported by political philosophers like Charles Taylor[411] and Bhikhu Parekh[412]

Modern democracies have come up with their own set of laws to restrict freedom of speech and expression according to their specific needs and challenges.[413] As discussed in Chapter 3, in India, laws were drawn up to restrain freedom of expression in order to prevent the threats it posed to peace and tranquillity in society. The process began with the introduction of the penal codes during the colonial regime. Based on the "unique" context of India, specific laws were created to take care of the performative dimension of speech, but more specifically these laws were characterized by a predisposition towards protecting against mental agitation and hurt sentiments in response to loaded words, offensive gestures, and transgression of hierarchical order.[414] Gradually newer laws were added to prevent harmful impacts of religiously offensive speech acts, significant among them being the addition of section 153(A) in 1898 and section 295(A) in 1927. In the post-independence period, these laws were adopted as part of the revised penal codes. So, with regard to defamation of religion and incitement of religious hatred, other than the limits drawn under Article 19(2) of the constitution, the two older, colonial-era statutory laws became particularly important. Section 295(A) aimed to prevent acts where nuisance is not the physical aspect of a communication, but arises because the message is considered provocative, indecent or denigrating. It prohibits "deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs." Though it is not a blasphemy law, it was meant to serve a similar purpose. It does not punish an imputation to god but to the

411 Taylor, "Rushdie Controversy," 118-21.

412 Parekh, "Case for Banning," 37-56.

413 I have discussed this point in greater details in the introduction of this thesis. The differences between European laws and the attitude of European and American courts have been discussed widely in, George Letsas, "Is there a right not to be offended in one's religious beliefs?" in *Law, State and Religion in the New Europe: Debates and Dilemmas*, ed. Lorenzo Zucca and Camil Ungureanu (Cambridge: Cambridge University Press, 2012), 239-60.

414 The Indian context and the necessity for strict laws to protect mental harm produced by religious insults has been discussed by Macaulay and James Fitzjames Stephen. Their views have been discussed in greater details in Chapter 2.

followers, whereby the outrage and hurt felt by the followers is protected. Section 153(A) is aimed to prevent the consequences of a communication that may indirectly bring about harm to others by promoting hatred against any religious group. So, it criminalises the promotion of "enmity between different groups on grounds of religion, race, place of birth, residence, language, etc.," or "doing acts prejudicial to maintenance of harmony." Both these laws form the basis of state action against offenders who indulge in any of the above mentioned activities. Unlike Dworkin and Waldron's propositions where the individual is the unit of analysis, these laws are meant to respond to the threat experienced by a "group" or "class" of citizens. Also unlike in Mill's argument, these laws criminalized not just instigation, but any speech act that intended to outrage religious feelings or promoted hatred. There is no necessary emphasis on either the consequences of the outrage, or the hatred produced. Such laws allowed the government to criminalize a wide range of activities in the name of protecting the religious sensibilities of the citizens. The "reasonableness" of government action was to be based on the test about how justifiably the government has used these statutory laws within the limits approved by the constitution. In order to make that judgment, the courts first needed to define the scope of these laws, which could help in understanding when and why religious offence became punishable.

3. Understanding "Religious offense" in the Light of Statutory Laws: A Perspective from Indian Courts

In the present section, I examine what according to the courts is problematic in religious offence that warrants government's intervention either in form of punishing the agent or in the form of censoring the speech act. Firstly, I discuss courts' understanding about what makes a publication contentious – whether it is the "manner" in which the opinion is expressed, or the "matter" contained in the publication. Secondly, I show how the courts further open the interpretation of statutory laws by emphasizing the essential difference between "punitive" and "preventive" laws. The subject-matter under consideration here shifts from the publication itself, to the judgment of the government officials, thereby expanding their powers to proscribe or forfeit contentious publications without proper examination of the facts.

3.1. The "Matter *v.* Manner" Conundrum

Debates over legal intervention against freedom of expression include a vital concern about what should be the determining factor in such decisions: is it the substance of the speech, or the form of expression? There is a strong belief among scholars that it should be the "manner" in which the views are expressed, and not the "matter," that should be the basis of analysis. The expression of an opinion can only be curbed, it is argued, to the extent that offence is caused by the manner in which it is expressed.[415] If the emphasis is shifted from "matter" to "manner," it allows the bar to be set higher and hence more favourable environment is produced for a marketplace of ideas in search of truth by not interfering with people's ability to make judgments about religion, without allowing the speech act to be deliberately offensive. Thus it offers a balanced position to those who value freedom of expression but also want the avoidance of offence.[416] It also helps to maintain a distinction between what people disagree with or disapprove of and, what causes offence. One of the extreme positions on this subject is reflected in the "content-neutrality" doctrine popularised by American jurisprudence.[417] The "content-neutrality" doctrine assumes that the state would not punish or restrict speech acts on the basis of the content or substance of the expression. "Content-neutrality" includes both "subject-matter neutrality" as well as "viewpoint neutrality," which means that speech acts could not be restricted on grounds of either the matter of the expression or the idea that the matter represented.

However, in the Indian context, the courts have emphasised the need to consider both the "manner" as well as the "matter" of the speech. The concentration on the "manner" of speech helps in two vital aspects that substantiate the "reasonableness" of legal intervention: 1) It helps the courts to trace the "intention" of the accused;

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[415] Feinberg, "Harmless Immoralities," 141; Peter Jones also emphasizes this point. See, Peter Jones, "Blasphemy, Offensiveness and Law," *British Journal of Political Science* 10, no. 2 (1980), 129-148.

[416] Feinberg, "Harmless Immoralities," 142; also see, H. L. A Hart, *Law, Liberty and Morality* (London: Oxford University Press, 1963), 38-48.

[417] For a descriptive understanding of "content-neutrality" doctrine, see, Steven J. Heyman, op. cit.

and 2) It helps the courts to weigh the intensity of the hurt. An important component of the punitive law under section 153(A) and 295(A) of the IPC is the idea of *mens rea*, which emphasises the need to examine the intention of the accused. In both the above mentioned laws, punishment is only justified if it can be proved that the accused had "deliberate and malicious" intentions involved in the contentious speech act. The courts analyse the "manner" in which an idea is represented in order to test for "deliberate and malicious" intention. Courts in India have upheld this reading of law in several of its judgments. For example, in 1960 the Allahabad High Court heard a case where the government of Uttar Pradesh had ordered the forfeiture of six books written by Baba Khalil Ahmad.[418] The controversy was regarding the character of a historical figure, Muwaiya, who was considered reverend by certain Sunni Muslim communities, whereas others thought him to be an evil person. The counsel for the applicant urged that the notification of the government was flawed, as any hurt caused was not intentional and the only aim of the author was to educate the masses about the negative character of Muwaiya and his role in Islamic history as a tyrant and a villain. Counsel also argued that the claims in the books were based on historical facts and therefore it could not be seen as a deliberate attempt to hurt religious sentiments. The court held that the "….intention of the writer of a book must be judged primarily by the language of the book itself….. If the language is of a nature calculated to produce or to promote feelings of enmity or hatred, the writer must be presumed to intend that which his act was likely to produce." The court further remarked that "even a true statement may outrage religious feelings" and therefore the argument about the content being based on historical facts did not really matter. In order to test whether the books were "injurious" in the above case, an inquiry into the language used in the publication, with reference to Muwaiya, was therefore considered important. It was reflective of the fact that the court believed that the "manner" in which ideas or arguments are presented become the primary indicator of the intentions of the author.

[418] The details of the case are present in Baba Khalil Ahamad v. State, (1960) A.I.R. 1960 All. 715. Until mentioned all the quotations and observations are based on this case reference.

Secondly, the courts also examine the "manner" in which the subject of speech is presented to differentiate between the content of speech acts that people disagree with or disapprove of, and those which cause offense, and are liable to legal intervention. Considering that it is impossible to quantify the feeling of hurt or offense, the courts concentrate on the intensity of offense. One of the primary tests that the courts have endorsed is that of the "reasonable man" doctrine, which implies that only those speech acts that have the capacity to "grossly offend" any "reasonable man," deserve to be restricted.[419] To apply this test, the court maintains that the expression "outrage" (as used in section 295(A)) needs to be distinguished from feelings like "wound," "hurt," and "injury". In *Sujato Bhadra* [420] case, the West Bengal High Court differentiated between "wounding" used in section 298 IPC and "outraging" used in section 295 IPC. It held that the expression "outraging" is much stronger than "wounding" and the term "outrage" meant "to wrong grossly, treat with gross violence or indignity."[421] The expression "grossly offensive" is a natural extension of this distinction maintained by the courts.[422] Also, the courts have repeatedly asserted that the impact of a speech act should not be judged on the basis of reaction that is expected out of a believer or an emotional person, rather the effect is "to be judged from standard of reasonable, strong minded, firm and courageous" person.[423]

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419 See, the courts observation in Shiv Ram Dass Udasin v. The Punjab State, (1954) A.I.R 1955 P H 28.

420 Sujato Bhadra v. State of West Bengal, (2006) 39 A.I.C. 239.

421 Ibid.

422 The court has also used other expressions like "aggravated form of insult" in *Ramji Lal Modi*, AIR 620; or "aggravated form of criticism" in R. V. Bhasin v. 2 Marine Drive Police Station, (2010) Criminal Application No. 1421 of 2007. But the intention in each of these expression remains to argue that not all forms of insult or claims of hurt can be taken into consideration while employing section 295(A). The expression "grossly offensive" is also used by courts in several other cases like Shiv Ram Dass Udasin, A.I.R 1955 P H 28; *N. Veerabrahmam,* A.I.R. 1959 A.P. 572.

423 State of Maharashtra & Ors. v. Sanghraj Damodar Rupawate & Ors., (2010) Civil Appeal of 2010 (Arising out of S.L.P. (C) No. 8931 of 2007). This test was first introduced by Justice Vivian Bose in Bhagwati Charan Shukla v. Provincial Government, A.I.R. 1947, Nagpur 1, where he held that the impact of words "must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and **v**acillating minds, nor of those who scent danger in e**ve**ry hostile point of **v**iew." Thereby this became an important test in Indian jurisprudence.

The most important signifier in each of the above-mentioned tests is the language used to express the opinion, since this is considered to be an explicit indicator of both – the intention of the accused as well as the intensity of the hurt caused. Based on the emphasis on the "manner" of expression in general, and "language" in particular, a study of courts' judgements provides some understanding about how they perceive the idea of religious "offense." The courts have held that "rational criticism of religion couched in restrained language"[424] or "doctrinal disagreement"[425] could not be considered an offence under law. However, even if the criticism of the religion is based on truth claims, the use of vile and insulting language would make the speech act eligible for punishment and prohibition.[426] The courts went so far as to argue that if the writing in question was not intended to insult other religions, or to promote hatred among different religious groups, then proseltyzing writings could also not be restricted.[427] The emphasis on language to decipher the intention, however, provides an extremely subjective tinge to the analysis. It further highlights the moralising aspect of courts' behaviour, whereby they dictate what form of expression is allowed or disallowed in a civil discourse.

I would be wrong to conclude, however, that the courts in India only depend on the "manner" of expression or the language used in the publication to judge its legality. In different cases courts have also emphasized the need to look into the "matter" or the content of the publications. It is maintained that in several instances, though the publication may not contain offensive language, the matter itself might be volatile and thereby attract legal injunction. Two primary reasons can be attributed to this approach: a) the extensive scope of statutory laws especially section 153(A) of IPC; and b) difficulty in deriving clear clinical tests to maintain the manner-matter distinction to contemplate religious offense. As discussed above, the emphasis on the "manner" of speech acts helps in judging the intention of the author as well as the intensity of the

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424 Lalai Singh Yadav v. State Of Uttar Pradesh, 1971 CriLJ 1773.

425 Zac Poonen v. Hidden Treasure Literature (2001), 2002 CriLJ 481.

426 *Henry Rodrigues and Anr*., 1962 CriLJ 564.

427 Ramlal Puri v. State Of Madhya Pradesh, (1970) AIR 1971 MP 152.

"hurt" caused by the speech. However, the statutory laws governing legal intervention to speech acts in India includes section 153(A), where the subject under analysis is whether a speech act "promotes or attempts to promote, on grounds of religion …. disharmony or feelings of enmity, hatred or ill-will" between different religious communities. In order to judge whether a publication falls under this category, the courts cannot solely depend on the "manner" of the expression, but are also required to analyse the content or the "matter." Consider for example the case of *Babu Rao Patel* [428] in the Supreme Court, where the court was considering the constitutionality of section 153(A). An additional question under analysis was whether political writing or historical truth could attract the provisions under section 153(A). The case was regarding the arrest of Babu Rao Patel after two of his articles – "A Tale of two Communalisms" and "Lingering Disgrace of History" – were published in the political magazine edited by him called *Mother India*. These articles were considered to be deliberate and malicious attempt to promote feelings of enmity, and hatred among Hindus and Muslims. It appeared in the Supreme Court in the form of special appeal from the plaintiff after the High Court had refused to quash the arrest order.

In the first article "A Tale of two Communalisms," Patel discussed Muslim communalism and argued that communalism in India was an instrument employed by political minorities. The central thesis of his article was that Muslims were a "violent race" with a "radical tradition of rape, loot, violence and murder." The second article, "Lingering Disgrace of History," was written as a protest against the naming of Delhi roads after the Mughal Emperors whom he calls "lustful perverts, rapists and murderers." He extended his criticism to argue that:

> From Mohammad Ibn Qasim, who landed in India in June 712 AD with 6000 Muslim cut-throats, to Mohammad Ali Jinnah, who cut the ancient cradle of a peace loving human race into three bleeding birds in August 1947, we have had 1235 years of bloodstained history in which our life has been constantly punctuated by endless raids, rapes, loots, arson and slaughter.

[428] The details of the case are present in Babu Rao Patel v. State of Delhi (1980), 1980 A.I.R. 763. Until mentioned all the quotations and observations are based on this case reference.

After discussing various atrocities and tyrannies of the Mughals ending with Aurangzeb, he wrote:

> To have a street named after this Mughal bastard in New Delhi, the capital of India, is not only a disgrace to the Hindus but a raging insult to the brave community of Sikhs. Had the Muslims been insulted thus, they would not only have burnt every house on the road named after the tyrant but also set fire to the whole damned city. The Muslims know how to guard their traditions.

In the Supreme Court, A. K. Sen, the counsel of the appellant argued that if the articles were seen as a whole, it would be visible that "A Tale of two Communisms" was no more than a political thesis, and the second article "Lingering Disgrace of History" was no more than a protest based on historical truths. It was contended that none of the articles attacked any religion and so there was no question of promoting and attempting to promote feelings of enmity, hatred or ill will between different religious groups. But the court rejected these arguments and held that both the articles were deliberately and maliciously written to promote feeling of enmity, hatred and ill-will between the Hindu and Muslim communities and this, the court maintained, "cannot be done in the guise of political thesis or historical truth." The method applied by the court to reach this conclusion is indicative of its approach. The court discussed the content of each article in detail, citing important sections and highlighting possible interpretations. Based on an extensive analysis of the "matter" contained in the articles, the court concluded that the possible implication of the publication was well within the scope of 153(A), and required action by the government. As we can see, both the subject-matter as well as viewpoint expressed in the publication together played a significant role in examining the consequences of the articles under controversy.

However, the pressure of statutory law is not the only reason why the courts include as part of their analysis, the "matter" of speech acts. They face extreme difficulty in maintaining a principled distinction between "matter" and "manner" of the speech act, in relation to religious offence. Can an expression be held to be offensive to the religious susceptibilities of the followers only if vile or insulting language is used to

denigrate religious beliefs, a revered personage, or a basic religious value system? The courts have held that freedom to criticise religion is only allowed if the criticism pertains to the practices of that religion and does not extend to its principles or basic tenets.[429] Also, any criticism or questioning of the character of a religious personage, or of a religious text is clearly prohibited.[430] The courts have held that even if the language used in the publication is neither aggressive nor outrageous, commentaries on these subjects have the potentiality to offend the religious sensibilities of the followers of any religion as well as promoting hatred among different religious groups. The use of restrained language, or the claims of historical truth, does not make the publication any less volatile, nor do they decrease the intensity of harm that such publications can cause. In such cases the reference point for the courts is the probable impact such expression could have on the religious followers.

The case of *Master Aman Preet Singh*[431] heard at the Punjab High Court in 1996 is reflective of this complexity. A Public Interest Litigation was filed by Master Aman Preet Singh, a class XII student of a school under CBSE (Central Board of Secondary Education) for issuance of appropriate directions for deleting remarks alleged to be derogatory to Guru Gobind Singh (the tenth Guru of Sikhs) contained in a History text book prescribed for Class XII students called *Modern India*. The book was written by historian Bipan Chandra and published by NCERT (National Council of Educational Research and Training). The applicant had claimed that the chapter on Guru Gobind Singh presented the Guru in a bad light, noting in particular a reference to him being an employee of Bahadur Shah, a Mughal king. It was alleged that such references were contrary to facts and opposed to the teachings and writings of the Guru and hence "offensive" to the Sikhs. In this case, the primary complaint was not about the "manner" in which the subject was discussed or about the language being vile or

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429 *Veerabrahmam*, A.I.R. 1959 A.P. 572.

430 *Baba Khalil Ahamad*, A.I.R. 1960 All. 715; *P. Ramasami*, 1964 1 MLJ 147.

431 The details of the case are present in Master Aman preet Singh and Others v. Government of India and others, (1996) AIR 1996 PH 284. Until mentioned all the quotations and observations are based on this case reference.

insulting, but rather the content itself. A historical claim about the life of the Sikh guru (even though duly supported by historical evidence) came under controversy.

The respondents including the publisher and the author, rejected the charge that the section deemed offensive in any way hurt the religious sentiments of any person. It was argued to be a fact based on historical research. They forwarded three arguments in favour of their position: 1) that the contentious section was extracted out of context and the chapter as a whole aimed to situate the Sikh religion in perspective and to stress the popular, egalitarian, and socially radical character of the Sikh religion founded by Guru Nanak; 2) that the authenticity of the objectionable remarks was a matter of "legitimate historical debate." It was maintained that many historians disagreed with the view expressed and the truth content could only be extracted by historians alone "by discussing it in a spirit of historical objectivity on the basis of acceptable historical evidence"; 3) the writer's view in this chapter was based on historical writings of eminent historians like Joseph Davey Cunningham (*History of the Sikhs*), William Irvine (*Later Mughals*), Sir Gukul Chand Narang (*Transformation of Sikhism*) and also upon a Gurmukhi script, *Panth Parkash*, written by Bhai Gian Singh and a persian work *Umdat-ul-Twarikh*.

The court, however, remained unimpressed by the arguments of the respondents. It upheld the petition and ordered the removal of the offensive passages. It held:

> A Guru who is respected, revered and worshipped and is admitted to have fought against Moghul emperor throughout his life and sacrificed all that which was precious to him cannot be permitted to be projected to students to be an employee of Moghul emperor as the same is likely to hurt the religious feelings of the community.

The court approached the case as a question about protection of secular values of the Indian polity rather than as an infringement of freedom of speech and expression. It maintained that freedom of speech and expression could not be treated as a license to infringe the rights or faith of others. In fact, it claimed that "the State is under a

constitutional obligation to preserve and protect the interests of Sikh Community," and therefore, "the respondent/authorities are under an obligation to refrain from becoming a party to such controversial writing, which may ultimately hurt the feelings of the Sikh community as a whole or a part of it."

Most significant was the observation of the court on the claim about historicity. This case was an explicit example of the blurring of the manner-matter distinction in relation to the impact of a publication. As there was no complaint about the form of expression or the language used, the decision was based strictly on the content or subject of the writing. The fact that the subject was related to a "controversial" historical episode in the life of Guru Gobind Singh was considered reason enough to restrict the publication in the name of protecting the values of secularism. The subject-matter expressed was seen as an insult to the Guru, and though the language was neither abusive nor libellous, it was thought to be potentially offensive to the religious sensibilities of the followers of Guru Gobind Singh. The court also overlooked the fact that any kind of historical enquiry necessitated free flow of arguments based on historical evidence. On this latter point the court held: "The writings about religious Gurus cannot be permitted to be justified on the basis of disputed and debatable historical truths, lest it may destroy the very secular fabric of the Constitution." Given that the author had never claimed that his views had unanimous acceptability among historians, while at the same time had shown that his statement was not bereft of historical evidences supported by several other historians, he had arguably allowed space for a view that it was aimed neither at denigrating any religious personage nor at hurting religious sentiments. But contrarily, the court suggested that "self restraint is expected in matters like- religion, particularly when they are apprehended to affect the sentiments of a section of the society, forming part of the Indian polity."

The above discussion shows that while interpreting statutory laws, the courts provide a very wide definition of religious offense and this is reflected in their consideration of both "matter" as well as "manner" of speech acts that are seen as requiring government action. Only a restrained language and non-interference in critical aspects of religion,

according to the courts, could be justified while dealing with the subject of religion. The immunity such a position provides to several aspects of religious belief, from attack or criticism, place constraints on free exercise of freedom of speech and expression, even historical research on the subject.

3.2. Extending the Reach of Law: Separating "Punitive" and "Preventive" Actions

While adjudicating over cases concerning contentious publications, the courts have maintained a distinction between "punitive" and "preventive" laws. The punitive laws like section 295(A) and 153(A) of the IPC can be used, to punish authors/publishers who produce religiously offensive publications, or publications that incite communal hatred, whereas the preventive law, like section 95 of the CrPC can be used to proscribe or forfeiture contentious publications. Section 95 of the CrPC empowers the government declare any printed material forfeited which "appears to the State Government to contain any matter the publication of which is punishable under section 124(A) or section 153(A) or section 153(B) or section 292 or section 293 or section 295(A) of the Indian Penal Code" by notification, "stating the grounds of its opinion." A look at the provision under section 95 would suggest that it is concomitant to the crime defined under the punitive laws i.e. the powers conferred upon the authorities to forfeiture or proscribe can only be used if the conditions mentioned under other laws like section 295(A) or 153(A) are fulfilled. However, the courts have highlighted at least three important aspects in which the provisions are not only defined differently but also allow wider latitude for state action in order to prevent the circulation of publications containing religiously offensive subject-matter.

Firstly, the courts have maintained that the reference of various IPC laws in section 95 is only description of the kind of offence required to be prevented and that the use of section 95 is not dependent on the tests mentioned for other statutory laws. Initially, some High Courts held that the law expected that cases be examined based on the tests suggested under section 153(A) and 295(A) and only if a violation was deduced under these clauses could the action of the government to forfeiture a publication be justified.

This included tests such as *mens rea*, as required in the punitive laws.[432] The approach of the courts seems to have departed from this position significantly after the *Nand Kishore Singh* case.[433] In this case, the Patna High Court argued that "it would be somewhat fallacious to mathematically equate the proceedings under Sections 95 and 96 of the Code with a trial under Section 295-A of the Penal Code with the accused in the dock." It held that the law under section 95 was essentially preventive in nature and to require the government be satisfied of the deliberate and malicious intention before using it was like defeating the very purpose of section 95. Also the statute did not specify that it should be "proved" to the state government or that the state government is "satisfied" that all requirements of punishing section are established. All that the section expected was that it should "appear" to the state government that the offending publication would come under the relevant section of the law. In this case the court also made it explicit that the "clear and present danger" doctrine, as used in the US, cannot be applied in the Indian case.

This interpretation of law was significant for many reasons. On the one hand it meant that the state government could proscribe a publication, without being satisfied about the tests like "deliberate and malicious intention" of the author or publisher in the said case; nor was the government required to defend its decision in the courts on such grounds. On the other hand, it also allowed the state government to act towards pre-emption of the threat posed by the controversial publication. Broadly, the courts allowed a wider space for government's intervention on contentious publications, much wider in latitude than in cases under punitive laws. This interpretation of section 95 was upheld in several subsequent cases, most notably including the Supreme Courts

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[432] For example, in *N. Veerabrahmam* the court held that "it is only insults to religion or religious beliefs that are deliberately and maliciously made that would bring into play section 99-A criminal procedure code." This position was reiterated in *Baba Khalil Ahamad*. This position continued till M/S Varsha Publications Pvt. Ltd. v. State of Maharashtra and Others, (1983) Cri LJ 1446. But since Patna High Court's observation in *Nand Kishore Singh* case, courts have changed their position on the subject.

[433] *Nand Kishore Singh*, AIR 1986 Pat 98.

observations in *Sri Baragur Ramachandrappa* case, and in *Sangharaj Damodar Rupawate* case.[434]

Secondly, within the application of preventive laws, the court expects the government to spell out the "grounds of opinion."[435] A close analysis suggests that the courts insist that "ground of opinion" should include at least the citation of the offending passages[436] and noting of the communities whose susceptibilities were allegedly hurt by the speech act[437] as well as the "conclusion of facts"[438] which led the government to forfeiture the publication. The ground of opinion formation helps the judges to understand the "application of mind" by the authorities. The courts emphasized on the importance to mention the grounds on which opinion of the government was based in order to avoid arbitrary action by the government,[439] and a failure on the part of the government to mention the ground of opinion becomes the reason for cancellation of the notification of forfeiture.[440] However, the courts have made this test very lenient and subjective by

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434 In Sri Baragur Ramachandrappa & Ors. v. State of Karnataka & Anr, (2007) 5 S.C.C. 11, the court agreed with the interpretation in *Nand Kishore Singh* and held: "It will be seen that section 95 and section 96 of the code when read together are clearly preventive in nature and one designed to pre-empt any disturbance to public order. At the same time, we find that section 95 does not by itself create a criminal offence and the reference to the various sections of the penal code are merely description of the kind of offence which need to be prevented by a declaration under section 95." This position was reiterated by courts in different cases like *R. V. Bhasin,* Criminal Application No. 1421 of 2007; and *Sanghraj Damodar Rupawate*, Civil Appeal of 2010 (Arising out of S.L.P. (C) No. 8931 of 2007).

435 In fact the courts have indicated that its only role in cases regarding forfeiture and proscription is to judge on the basis of notification, whether or not the action of the government falls within the scope of 'reasonable' restrictions. See, Harnam Das v. State of Uttar Pradesh (1961), 1961 A.I.R 1662.

436 Mohammad Khalid v. The Chief Commissioner, Delhi, (1967) A.I.R. 1968 Delhi 13.

437 *Harnam Das* 1961 A.I.R 1662.

438 *Sanghraj Damodar Rupawate*, Civil Appeal of 2010 (Arising out of S.L.P.(C) No. 8931 of 2007).

439 In *Lalai Singh Yadav*, 1977 AIR 202 , Justice Krishna Iyer held: "If you laze and omit, the law visits the order with voidness and this the State Government must realize especially because forfeiture of a book for a penal offence is a serious matter, not a routine act to be executed with unconcern or indifference. The wages of neglect is invalidity, going by the text of the Code. These considerations are magnified in importance when we regard the changeover from the Raj to the Republic and the higher value assigned to the great rights of the people."

440 *Lalai Singh Yadav*, 1977 AIR 202; *M/S Varsha Publications*, Cri LJ 1446. They argued that since the law allowed the victim to challenge the decision of forfeiture or ban in the High Court (under section 96 of the CrPC), it was important for the victims to know the reasons for proscription, in order to defend their position. Also, in order to decide the case, the court needed to be informed as to "which communities were alienated from each other or whose religious beliefs had been wounded according to the Government, or why the Government thought that such alienation or offence to religion had been caused." These details, according to the court, were necessary for it to reach to a conclusion on the subject.

reducing the details expected by the officials to spell out in a notification. There was the threat that the objectionable content, if declared in the notification explicitly, will ultimately be made available in the public sphere and thereby defeat the very objective of forfeiture or ban. In *Nand Kishore Singh*[441], the Patna High Court took cognizance of this problem and brought some clarity on the issue. It opined:

> The declaration of forfeiture is consequently not required to be an exhaustive or self-contained document incorporating all the offending material as also each and every fact on which it is based. Any such detailed recitals or contents in a notification are neither mandated by statute nor precedent and would perhaps be incongruous in the nature of the notification envisaged by the statute….. It is amply sufficient if on the grounds of opinion, that is, the conclusions of fact being duly stated, the Government's opinion arrived at there from is clearly exhibited that the publications come within the mischief of the law.

The mentioning of grounds of opinion, though important, the courts held that it did not need to include detailed exposition of subject-matter but should exhibit the link between the conclusion of facts and the decision by the government. This is not an exception, as the courts have been consistently citing this case in order to check the validity of the notifications. The detailed notification was mandated in order to ascertain that the officials had conducted a thorough examination of the contentious publication before acting against it. The exemption pronounced in *Nand Kishore Singh*, therefore, protected the authorities from this mandatory procedure making it easier for them to act against a contentious publication, even without a survey of the publication in question. The decision of the authorities to act may be guided in such cases, less by the content of the publication, and more by the form of opposition or threat to public order that such publication would have attracted.

Thirdly, the court also held that in cases where any person appealed to the High Court against the forfeiture order, the onus of proof fell on the aggrieved i.e. it is for the petitioner in such cases to prove that the book does not contain anything disallowed in the section under which the order was passed. This followed from an interpretation of

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441 *Nand Kishore Singh*, A.I.R. 1986 Pat. 98.

law under section 96(1) of CrPC which deals with the application in the High Court against forfeiture. Section 96(1) states:

> Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under section 95, may, within two months from the date of publication in the Official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of the newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is referred to in sub-section (1) of section 95.

Therefore, in order to challenge the order of forfeiture, the applicant would have to show that: a) the book in question does not contain anything "which will offend or outrage the religious feelings of any section of the society"[442]; b) Further, that there did not exist any intention on the part of the author to do so;[443] and c) therefore the opinion of the government to proscribe the publication, could not be sustained. This was in complete contradistinction to the requirements of punitive laws where the state government was expected to defend its decision to prosecute an individual by presenting evidences that not only proved the commission of offence but also pointed at "deliberate and malicious" intention involved in the act.

Considering all these aspects together shows that if the state government follows the technical requirements, the probability of its action being upheld by the courts are quite high. It is far easier for government authorities to proscribe and forfeiture a contentious publication than to punish (under statutory law) an individual attached to that publication. This also reveals the courts' attitude towards the balance that it was expected to maintain between freedom of expression and claims of religious offence. Its interpretation of statutory laws provides wide space for government's action against publications that are charged with defaming religion or promoting hatred against any religious groups. This is further confirmed by the difference the courts maintain

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442 High Court in *Baragur Ramachandrappa*, (1998) CriLJ 3639.

443 *Sanghraj Damodar Rupawate*, Civil Appeal of 2010 (Arising out of S.L.P.(C) No. 8931 of 2007).

between punitive and preventive law. The claim of freedom of expression becomes weaker with respect to controversial publications as the court does not intervene against censorship or proscription of such material in the name of public interest, if the procedural aspect of law is not violated. The threat perception of the government agencies becomes an important guiding point and the interpretation of the preventive laws by the courts helps it to justify its prompt action.

In the above section, I analysed how the courts interpret statutory laws, including the tests and doctrines it uses, to adjudicate on the subject of publications claimed to be religiously offensive. But an important question that still needs to be considered is why courts provide such broad definition of religious offence, thereby making government's action justifiable in a wide range of cases. I turn to this question in the next section.

4. Restricting Freedom of Expression: Courts and the Justifications for Legal Intervention

There is some general consensus that limitations to freedom of expression are acceptable if there are fears of disturbance to public order. Yet there is much less agreement on how to judge whether a specific speech act is in fact a threat to public order, and therefore deserving prohibition. Mill's differentiation between "advocacy" and "instigation," as I have discussed earlier in this chapter, was indicative of this tension. That idea became more explicit in Justice Holmes' famous advocacy of the "clear and present danger" doctrine that dominated American jurisprudence on freedom of speech questions during the last century. Justice Holmes in *Schenck*[444] argued that it was largely a matter of "proximity and degree." He held: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." This approach was further fine tuned during his dissent in the *Abrams*[445] case where he was joined by Justice Brandeis. In this case,

444 *Schenck,* 249 U.S. 47.

445 Abrams v. Unites States, (1919) 250 U.S. 616.

Holmes opined that there should not only be "clear and present" danger but rather the danger should be imminent and only if a direct relation could be established between the intentions of the actor and the consequence of the act, it would be reasonable to punish such acts. In other words, it is argued that there should be a direct consequential relation between the speech act and the threat to public order.

In the Indian case, public order as a valid limitation to freedom of speech and expression was inserted in the constitution through the first Amendment in order to create a balance between "individual freedom" and "social freedom."[446] The Supreme Court in its various judgments has refined the definition of the term "public order" thereby drawing out its scope and limitations, especially when the claim of public order is used by the government to restrict freedom of speech and expression. In *Superintendent, Central Prison, Fatehgarh*[447] the court defined public order as absence of disorder involving "breaches of local significance." The state of public order was marked as the orderly state of society or community "in which citizens can peacefully pursue their normal activities of life." The judges accepted that "public order" was a wide term, that might include minor "law and order" aspects or major issues like threat to state security such as attempts to overthrow it, and therefore it was asserted that the usage of the term should be precise. Emphasizing precision, the court in *Dr. Ram Manohar Lohia*[448] referred to a set of three concentric circles with "law and order" and "security of state" in its outer and inner most circles with public order in the middle. The court opined that "an act may affect law and order but not public order" and that not all cases of public disorder pose a threat to the security of state. In *Arun Ghosh*[449] the court further asserted that the disturbances of public order needed to be distinguished "from acts directed against individuals, which do not disturb the society to the extent of causing a general disturbance of public tranquillity." "It is the degree of

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[446] Nehru's "Statements of Objects and Reasons" appended to the Constitution (First Amendment) Act, 1951.

[447] Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia, (1960) 2 SCR 84.

[448] *Dr. Ram Manohar Lohia*, 1966 AIR 740.

[449] Arun Ghosh v. State of West Bengal, (1969) 1970 3 SCR 288.

disturbances and its effect upon the life of the community in a locality" that would determine, according to the court, "whether the disturbance amounts only to a breach of law and order."[450] Since the constitution of India devolves the power of maintaining law and order to the state government, it is the prerogative of the state officials to decide when a condition resembles a public order problem and also to determine the possible ways to handle the situation. However, in order to justify its action against freedom of speech, the government was required to show: a) the speech act had caused or was likely to cause actual disturbance of a local significance; and b) the speech act should not only affect one or few individuals but the larger community.

4.1. Public Order and the Issue of Religiously Offensive Publications

The threat to public order posed by religiously offensive publications became the reason for the birth of most statutory laws during colonial period, which govern the freedom of speech and expression even today. In the post-independence phase, the controversial religious content of political speeches and the printing press were thought to be playing a major role in promoting enmity and instigating violence among different communities, and were therefore considered as eligible for regulations.

But how and when does religious offense lead to public order problems, and when is the government justified to act in such cases? In the context of independent India, the judiciary was expected to balance the claims of social cohesion with that of individual liberties. The fear was that the government in power could use the threat of public order for political purposes, thereby restricting freedom of speech and expression unreasonably. Contrarily, there was also a fear that even small misjudgements on the part of the authorities could lead to severe public order problem. So the court was expected to draw the line between freedom of expression as a fundamental right to be freely enjoyed by all citizens, and its misuse that threatened public order. In this regard, Pratap Bhanu Mehta is very critical about the role of judiciary.[451] He argues that since

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[450] Ibid.

[451] Mehta, "Passion and Constraint," 330-332.

legally the fundamental right to expression can be regulated on grounds of "maintaining public order," the court allows any "insult" to religion to be regulated. This, according to him, is primarily allowed because the courts read the public order exception in article 19 and 25 so broadly that whenever a restriction is said to be associated with public order, the courts do not pursue any further question. In the process, as Mehta argues, the courts also assume that every attempt to insult religion must have a tendency to disrupt public order. This analysis of judiciary's role, though suggestive, is not free from limitations. While Mehta's conclusion that the judiciary refrains from allowing private judgement to impede the "legitimate purposes of the state that can be publicly justified," especially in relation to religious discourse, might be correct, his analysis of the cases to reach the conclusion are inconclusive and do not adequately do justice to the judiciary's position.

Let us consider two cases, one related to criminal prosecution for vilifying religious personage, the second related to the ban and forfeiture of a book. These examples help us to consider the court's role in questions of public order from different perspectives. In the first case of *Ramji Lal Modi*, a case Mehta also considers, government's action directly impacted freedom of speech and expression, as well as raising issues of the individual's personal freedom. In the second case of *Lalai Singh Yadav*, government's action was limited to proscription of the controversial publication.

Case 1: As early as 1957, the Supreme Court was faced with the questions concerning "insult to religion" and its impact on public order situation. While testing the constitutionality of section 295(A) of IPC, in *Ramji Lal Modi*, the court dealt with the subject in great details. In August 1952, a cartoon appeared in a popular Hindi daily published from Allahabad, Uttar Pradesh, *Amrit Patrika*, which caricatured Prophet Mohammed in the form of a donkey. The state witnessed protests from the Muslim community which turned violent in many instances. *Bandhs* and demonstrations were organized, despite prohibitory orders from the government.[452] Repeated apologies by the editor, the publisher and the director-in-charge of the newspaper did not help to pacify the

[452] "Hooliganism Breaks out again in Kanpur," *Times of India*, August 14, 1952.

situation.[453] It was only after the government's decision to prosecute the newspaper that the situation was controlled. In the month of November, when the case was still very fresh, Ramji Lal Modi, the editor and publisher of a monthly magazine called *Gaurakshak*[454], wrote an article in the November issue questioning the protests by the Muslims. On the one hand the article questioned the rationale behind such reactions, and on the other hand it launched a scathing attack on the basic tenets of Muslim religion including popular beliefs about the Prophet. Fearing threats to law and order in the polarized communal context, the government ordered the prosecution of Ramji Lal Modi under sections 153(A) and 295(A) of the IPC. In the Sessions court of Kanpur, the judge acquitted him of the charges under section 153(A) but found him guilty under 295(A), and thereby sentenced him to 18 months rigorous imprisonment. Modi then appealed against the judgment before the High Court, but the court held that the article was published with a deliberate and malicious intention of outraging the religious feelings of the Muslims and hence was punishable.

The accused then approached the Supreme Court with two separate applications, one claiming stay on the High Court order and the other, under article 32 of the constitution urging, that section 295(A) was ultra vires and void in as much as it interfered with the petitioner's freedom of speech and expression.[455] The Supreme Court rejected the application for stay and dismissed the other application, thereby upholding the action taken against Modi. During the trial, the counsel for the appellant argued that it was only in the "interest of public order" that a "reasonable restriction" to freedom of speech and expression could be justified, and therefore, likelihood of public disorder "should be a matter of proximate and not remote consideration." He substantiated these arguments using Supreme Court's observations in the *Romesh Thapar*[456] and *Brij Bhushan* cases[457] and insisted that in the present case there was no direct threat of

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453 "Case against Newspaper: Police Official's Deposition," *Times of India*, October 6, 1952.

454 This magazine was launched in order to serve the cause of Cow Protection Movement.

455 The details of the case are present in *Ramji Lal Modi*, 1957 AIR 620. Until mentioned all the quotations and observations are based on this case reference.

456 *Romesh Thapar,* AIR 37 SC 124.

457 *Brij Bhushan*, AIR 37 SC 129.

public disorder. Secondly, he maintained that insults to religions and religious beliefs may or may not lead to public disorder and therefore there was always a sense of ambiguity attached to the practical implications of section 295(A), which was dangerous if allowed to curtail a fundamental right. The Court rejected both these submissions and held that section 295(A) was well within the scope of article 19(2) which set reasonable restrictions to freedom of speech and expression. The observations of the court were significant for future cases. On the first submission, the court held that after the First Amendment, Romesh Thapar and Brij Bhushan's cases were no more relevant as the First Amendment had significantly changed the nature and scope of article 19(2). The court differentiated between two significant phrases- "for the maintenance of" and "in the interest of." According to the court, the addition of the phrase "in the interest of" public order had significantly widened the scope of article 19(2), and therefore, even if some action by the government might not be justified on grounds of directly "maintaining" public order, it may still be important in "the interest of public order." Chief Justice S. R. Das pronounced: "If …. certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restriction 'in the interests of public order' although in some cases those activities may not actually lead to a breach of public order." The court also rejected the claim that freedom of speech and expression could only be restrained if the threat to public order was proximate and imminent. Countering the second proposition, the court did not believe that there was any sense of ambiguity in the law. It held that "deliberate and malicious" intentions was *sine qua non* of section 295(A) and therefore only those acts of insult to religion or religious beliefs which were carried out with deliberate and malicious intention were punishable. Deriving a direct connection between the calculated tendency of an "aggravated form of insult" and "public order," the court held that such intentional vilification, aimed "clearly to disrupt the public order and the section, which penalises such activities, is well within the protection of cl. (2) of article 19." It meant that if the government could successfully show that an act was "deliberately and maliciously" aimed at insulting the religion or religious beliefs, it would be assumed to be a threat to public order and hence punishable under law. Based on these arguments, the court held Ramji Lal Modi guilty and rejected his application.

Significantly, in the unrecorded trial of the editor and the publisher of *Anand Patrika*, who were prosecuted by the state under section 295(A) for publishing the cartoon of Prophet, the accused were acquitted by the Allahabad High Court due to the failure by the prosecution to produce enough evidence to prove that the act was done with "deliberate and malicious" intention.[458] The contrast in both cases is evidence of the court's differing approach. It is significant that the reactions to the publication of the cartoon were directly responsible for law and order situation in Uttar Pradesh. The acquittal of the editor and publisher of the newspaper hinted that for criminal prosecution, it was necessary to establish a link between the intentions of the accused and the reaction of the members of religious community who claimed feeling of "offense." In Modi's case, the fact that his essay was in reaction to the events surrounding the publication of cartoon helped to establish deliberate and malicious intention. The same did not apply to the editor or publisher of *Amrit Patrika* who had continuously pleaded it to be a case of ignorance and had also publicly apologised for the same. So, it can be concluded that though the court believed that the government could act based on its assessment of public order problems and it did not compulsorily include the "clear and present danger" test, the prosecution of individuals under criminal law required the government to prove presence of deliberate and malicious intentions.

The above analysis hints at two important aspects of the court's position on the subject of criminalizing speech acts that contain religiously offensive subject. First, the courts allow for action if there was aggravated form of insult, presuming that such utterances had every chance to flare up into a public order issue. At the same time it did not explain what could be included as aggravated form of insult, or how it is to be differentiated from insults of a general kind which could not be punished. The reluctance of the courts to examine or provide clear directions left it largely to the prerogative of the government to decide when to act. Secondly, the actors in these cases could only be held guilty if deliberate and malicious intention was proven. Considering

[458] Though the judgment was not recorded, the case was closely followed in the press owing to the public order situation it had created. See, "Hooliganism Breaks out again in Kanpur: Government decides to prosecute Hindi paper," *Times of India*, August 14, 1952; "Case against Newspaper: Police Official's Deposition," *Times of India*, October 6, 1952; "Allahabad Editor acquitted: Muslim feelings not wounded," *Times of India*, April 23, 1954.

the fact that the intention was to be derived from the content and language of the publication, the court tried to distance the justification of government's action from its implication for an individual's personal liberty. The only justification required for the government's action is the presumption of public order problems, leaving open the issue of whether the prosecution was justified to be decided by the judiciary. Arguably, such a position enables the government to act on its presumption of public order threats without taking into account the reasonability of such action vis-à-vis freedom of speech and expression. This approach of the court has even more serious implications in cases involving proscription or banning of the books in a territory.

Case 2: The second case is related to the proscription order of the book *Sachchi Ramayana*.[459] The case was about Uttar Pradesh government's appeal in the Supreme Court against the Allahabad High Court decision to strike down government order banning *Sachchi Ramayana* or *Ramayana: A True Reading* written by radical Tamil social reformer Periyar and translated and published by Lalai Singh Yadav, a resident of Uttar Pradesh.[460] The government believed that by treating the main characters of the epic with disdain, the author and publisher had offended the religious sentiments of a majority of Hindus.[461] Though the Supreme Court upheld the decision of the High Court, it was essentially on technical grounds and as the judgment mentioned, it was not reflective of the view of the judges "on the merits of the book or its provocative vitriol."[462]

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459 It was translated and published by Lalai Singh Yadav after seeking permission from Periyar. It was published at Ashok Pustakalaya: Jhinjhak, Uttar Pradesh in 1969.

460 The government did not mention the grounds of opinion formation in the notification and thereby left the aggrieved community and offending language as subject to inference. The High Court held the notice insufficient as it did not clearly state the ground of its opinion as to why the government believed the publication was to fall under section 295(A).

461 Contemplating threat to public tranquillity, the Intelligence Department sent copies of the book to Kanpur police to enquire if any action could be taken. The Magistrate then decided to forfeit all copies from Lalai Singh Yadav. Later, formal orders of forfeiture of all the copies of the book, both in Hindi as well as English language, were notified through the Gazette of Uttar Pradesh on December 8, 1969 and December 20, 1969 under section 99 A of the CrPC. This information was given by the then health minister of UP, Krishnanad Rai on the floor of UP State Legislative Assembly. See, *UP State Assembly Debates*, May 21, 1969, vol. 279, part 3, 323.

462 The details of the case are present as *Lalai Singh Yadav*, 1977 AIR 202. Until mentioned, all the quotations and observations are based on this case reference.

In the unanimous judgment written by Justice V. R. Krishna Iyer, the approach of the court on the question of proscription of a contentious publication under the threat of public order situation is discussed in great depth. Firstly, the court made it absolutely clear that the power to ban or forfeiture controversial publication was a legitimate power in the hands of the government and "whoever violates by bombs or books societal tranquillity will become target of legal interdict." Secondly, it was maintained that though the "clear and present danger" test, as popularized in American jurisprudence, was not very relevant for Indian conditions, extreme caution was required on the part of the government in its judgment of how to safeguard social tranquillity. Thirdly, reiterating the views of the court in *Ramji Lal Modi* the judges recognized a clear relationship between religious offense and public disorder. It held: "Hatred, outrage and like feelings of large groups may have crypto-violent proneness and the State, in its well-grounded judgment, may prefer to stop the circulation of the book to preserve safety and peace in society….. The actual exercise will depend not on doctrinaire logic but practical wisdom." The practical wisdom of the government was to depend on a number of factors including the context and content of the publication. As mentioned earlier, the court rejected the application on technical grounds, however, it also pointed that if the state government thought that the peace of the state would be disturbed by the book under consideration, it could reissue a fresh notification, keeping in mind the essential legal requirements. So, though the judgment was in favour of the publisher of the book, the court hinted that, the technical aspects aside, the government was well within its legitimate capacity and powers to order proscription under the perception of threat to public order.

Both the above cases had some significant similarities and differences. It is clear that the Supreme Court in both the cases held that the government's intervention was justified and was constitutionally protected under article 19(2) if it was seen to be "in the interest of' public order." The significance of the phrase "in the interest of" was made explicit by the court's reference to the First Amendment whereby the phrase was introduced to the constitution. This was in contradistinction to Mehta's assumption that the fundamental right to expression could be legally regulated for "maintaining public order." The Supreme Court reasoned that "in the interest of public order" has larger

connotation and implications for government's action than "for the maintenance of" public order, as it allowed for intervention even if there were no direct threats to public order. The courts also rejected the application of the "clear and present danger" doctrine in the Indian context. Furthermore, the two judgments also revealed that, unlike Mehta's proposition, the court did not base its judgment solely on the claims of threat to public order by the government. In the first case, the court held that the prosecution of an individual also required that "deliberate and malicious intention" was proven. In this way the court balanced the individual's personal liberty with the threat posed to public order by the contentious publication. In the second case, the court emphasized the importance of mentioning in the notification order the grounds on which the government based its opinion, which could reflect the application of mind by the government in making the decision to forfeiture or ban a particular publication. Therefore, in such cases the threat to public order, though an important condition, was not considered as a sufficient claim for justifying government's action under "reasonable restrictions." However, under the looming threat to public order, the government was totally justified in acting against the publication or the person responsible for it.

4.2. "Secularism" and the Protection of Right to Conscience and Religion

One of the central dilemmas attached to the laws against religious offense has centred around the role of the state– concerning the scope and limitations of state intervention in such subjects. For example, a very strong justification in favour of blasphemy laws has been that it is the duty of state to preserve morality in society. This was especially true about societies where blasphemy laws were used to protect the religion of the majority, from insult.[463] But in the changed context of multicultural societies, this position faced challenges from different quarters. One school of thought argued that the restriction of freedom of speech and expression on the pretext of religious offense had

[463] See, Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965), 23-25. For example, one of the strongest advocates of blasphemy law, Lord Devlin justified the presence of blasphemy laws because he believed that morals and religion were intrinsically related.He believed that enforcement of morals in society was the duty of state and hence it was also required to protect religion from attacks.

lost its moral justification. For example, George Letsas believes that the fact that each religious system is based on a set of "particularities" which is represented in the form of doctrines, symbols or figures, any protection of religion would mean forcing people to accept the ethical ideas and ideals that they might not have contemplated or have been familiar with.[464] This, according to Letsas, should not be the role of state, and therefore any law like blasphemy could not be supported. Other critiques, like Peter Jones, argue that "the protection of religion for moral purposes ceases to be feasible in a multi-religious society" because it would be detrimental to the idea of a secular state to prefer and protect a certain conception of good life represented by the religion of the majority, and on the other hand if the state "tried to avoid that inequity by protecting all religions it would be supporting contradictory beliefs and beliefs which had different moral consequences."[465] So, it was asserted that the state should either not indulge in restricting freedom of expression in the name of religious offence, or it should look for a more potent justification to legitimize its action, like the threat on public order. However, there were others who believed that the law of blasphemy should be extended to protect all religious subjects. It was argued that the changing nature of societies, whereby it was becoming multi-religious and plural, required a secular state to extend such protections to followers of all religions. For example, Lord Scarman, who favoured the expansion of the common law crime of blasphemy to protect the religious feelings of non-Christians in Britain, during the *Lemon* case[466], urged that the common law be changed by legislation to protect the sensibilities of all religious groups. Scarman cited the example of India to build a case for the need of protection of all religions in a plural society. He said: ". . . . In an increasingly plural society such as that of modem Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule, and contempt ....When Macaulay became a legislator in India, he saw to it that the law protected the religious feelings of all. In those days India was a plural society:

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464 Letsas, "Right not to be offended," 255-7.

465 Jones, "Blasphemy," 133.

466 Whitehouse v. Lemon, (1979) 2 WLR 281. It was a blasphemy case in UK regarding a poem published in Gay News which was considered to be denigrating the image of Christ.

today the United Kingdom is also…. My criticism of the common law offence of blasphemy is not that it exists but that it is not sufficiently comprehensive ….”[467] Britain abolished the offences of blasphemy and blasphemous libel from its common law in 2008.[468]

Looking at the history of laws against religious offense in India one can conclude that ever since it got codified under the colonial state, it was meant to protect followers of all religions. But the question about how a secular state should behave in a multi-religious and plural society still remained a puzzle. Unlike many western democracies, where the principles of secularism expected an approach of neutrality from the state on the issues concerning religions, in India it was expected to maintain what Rajeev Bhargava has famously called “principled distance.” On the one hand, it meant equal treatment of all religions and non-interference in matters internal to religion[469]; on the other hand, on subjects that affected the public in general, it had every right to assert its authority. Protection of the right to freedom of religion as guaranteed under article 25 also became a constitutional as well as a moral duty for the state to uphold in India’s multi-religious society.

But how was the state expected to behave when freedom of religion was threatened by publications that vilify and insult religious beliefs, symbols and practices? In its various judgments, the court has been conscious that freedom of speech and expression does not clash with other constitutional guarantees, including freedom of conscience and the right freely to profess, practise and propagate religion. The courts’ attempt to preserve the balance is based on two premises: First, as discussed earlier in the chapter, the courts held that wounding religious susceptibilities of other religious denominations could lead to disruptions of public order; and second, the courts asserted that, freedom of conscience and religion needs to be protected and it is the duty of the state to create

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[467] As quoted in Robert Post, “Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment,” *California Law Review* 76, no. 2 (1988), 312.

[468] Blasphemy was removed from common law by *Criminal Justice and Immigration Act*, 2008.

[469] The state could, however, interfere for concerns like “public order, morality and decency.”

environment where this right could be freely enjoyed. One of the earliest examples of this attitude of the court was reflected in *N. Veerabrahmam* case.[470] The Andhra Pradesh High Court in this case was considering the constitutionality of Section 99(A) and ban of the book *Bible Bandaram*- which was claimed to be a rationalist critique of the Bible. The critique pointed at the incongruities and inconsistencies in the Bible; raised doubts about its authorship; and made controversial claims: for instance, since nobody can be born of a virgin, Jesus was a product of adulterous union and the Immaculate Conception theory was a cover-up. Introducing a balanced approach the court held: "People are at liberty to write books without offending deliberately the religious sentiments of other citizens who are as much entitled to certain freedoms as the petitioner himself." Rejecting the argument from the counsel for the petitioner that the book was based on rational and free thinking and was therefore eligible for protection under article 19(1)(a), the court defined the boundary of such claim by arguing that free thinking did not "involve freedom to make scurrilous attacks on the religion and religious beliefs of other sects with impunity." "It is not free-thinking to abuse and insult other religions," the court observed. Deliberating the subject further, the judges held that "no citizen could claim a right to insult the religion or religious beliefs of another section of the population." It maintained that it was the duty of the state to ascertain that citizens are able to exercise freedom of religion and conscience, and according to the court, section 99(A) of the CrPC as well as section 295(A) of the IPC were legitimate power in the hands of the government to ensure such protection to the rights of all its citizens. The emphasis on protecting freedom of conscience and religion was based on the understanding that though freedom of speech and expression was important, it did not enjoy any special status and hence needed to be balanced with competing claims based on other fundamental rights. In the final section of the judgment, the court observed that "all the citizens of India are guaranteed freedom of religion and freedom of conscience by our Constitution and each one has a right to pursue his own way of attaining salvation, unhampered and without interference from others."

[470] The details of the case are present in *N. Veerabrahmam*, A.I.R. 1959 A.P. 572. Until mentioned all the quotations and observations are based on this case reference.

This attitude of the court provides both a moral and a legal protection to freedom of conscience and religion against freedom of expression. By recognizing that freedom of religion should be "unhampered and without interference," the courts provide a certain immunity to religions against criticism. This perspective is further reflected in the way courts determine what constitutes legitimate criticism when it is directed against religion. So for example, the courts have proved to be lenient against criticism of religious practices but at the same time made it explicit that any insult or vilification of religious personage and criticism of religious texts and beliefs could not be allowed.[471] It was based on the perception that a criticism or insult of religious personage and of religious texts amounted to interference in the faith of others, something that could not be allowed in a secular and plural society like India. This position of the court was reiterated in the Supreme Court's judgment in *Sri Baragur Ramachandrappa* where the court observed:

> ...no person has a right to impinge on the feelings of others on the premise that his right to freedom of speech remains unrestricted and unfettered. It cannot be ignored that India is country with vast disparities in language, culture and religion and unwarranted and malicious criticism or interference in the faith of others cannot be accepted.[472]

The court emphasized that the secular values needed to be protected and the state was duty bound to act in case such values are threatened, even if it was done under the garb of freedom of expression. Therefore, the courts provide a justifiable reason for government's intervention by warranting a restriction on freedom of expression in cases where it is found to interrupt free exercise of right to freedom of religion.

Government's action is also justified, according to the court, in cases which include acts of vilification or wounding religious susceptibilities of followers of any religion as it is judged to inevitably lead to the disruption of public order. "If there is no law authorising the executive to take necessary action …… there will be disorder in society and bitter

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[471] This aspect has been discussed in details in section 2.1 of the chapter.

[472] *Sri Baragur Ramachandrappa,* 5 S.C.C. 11.

feelings and even hatred between various sections of society which is not conducive to the maintenance of order," the court observed in *N. Veerabrahmam* case.[473] This was another ground on which section 99(A) was considered well within the limitations set by article 19(2) to the freedom of speech and expression. This aspect was further elaborated by justice Krishna Iyer in *Lalai Singh Yadav*.[474] He maintained that in a country like India, the secular state was obligated "to create conditions where the sentiments and feelings of people of diverse or opposing beliefs and bigotries are not so molested by ribald writings or offensive publications as to provoke or outrage groups into possible violent action." Justice Iyer believed that the state was expected not only to protect society against breaches of peace but also to prevent the causes of such state of order. This essentially involved proscribing publications which were deeply offensive to the religious sentiments of any section of population. He says, "…public power comes into play not because the heterodox few must be suppressed to placate the orthodox many but because every- one's cranium must be saved from mayhem before his cerebrum can have chance to simmer. Hatred, outrage and like feelings of large groups may have crypto-violent proneness and the State, in its well-grounded judgment, may prefer to stop the circulation of the book to preserve safety and peace in society."[475] The principle of balancing counter claims about fundamental rights along with the assumption of threat inherent in misuse of freedom of speech and expression allowed the space for state governments to ban books which insulted or even criticized religions.

5. Conclusion

In this chapter, I examined the way courts in India have responded to the claims of freedom of expression in relation to religious offence. I have argued that the decisions and observation of the courts show a tilt towards protecting the religious sensibilities of citizens from being offended by religiously offensive publications. In the process, the courts allow wide latitude for government intervention both in its punitive as well as

[473] *N. Veerabrahmam,* AIR 1959 AP 572.

[474] *Lalai Singh Yadav*, 1977 AIR 202.

[475] Ibid.

preventive actions. This reading of the court's attitude departs from Sorabjee's and Dhavan's study whereby they held that courts in general and Supreme Court in particular has put a strong defence in favour of freedom of speech and expression. A point to note in this comparison is that both Sorabjee and Dhavan talk about freedom of speech and expression in general and my study concentrated only on religiously offensive publications.[476] Though Sorabjee and Dhavan's arguments may be more generally valid, I would argue that my own analysis of publications that defame religion or promote religious hatred certainly qualifies their more general claims. The question then is: why do courts behave as they do in response to claims about religious offence? I have tried to respond to this issue in two ways: a) by trying to show how courts contemplate the idea of religious offence, based on their interpretations of statutory laws; and b) by studying the arguments the courts build in reaching to such an expansive definition of religious offence.

In the first part of the chapter I discussed two forms of the court's interpretations of statutory laws which affect the definition of religious offence in the Indian context. Firstly, the court looks at both the – "matter" of the opinion expressed and the "manner" in which it is presented – in order to decide about the justifiability of government's action on the subject. This includes an emphasis on the language used in the publication, whereby the courts decipher the intention of the author as well as the intensity of the hurt caused. At the same time, the courts also maintain that there are some subjects that cannot be discussed even in mild and non-harmful language. These include criticism or insult of religious personage, denigrating religious texts or sacred beliefs. This, as I have shown, gives very broad scope for state intervention and also some kind of immunity to religion from criticism, a point also made by Mehta.[477] Secondly, I argue that this definition receives a far broader support in case of preventive laws than punitive laws. The distinction that the courts have maintained between punitive and preventive laws allows state governments to act promptly based on their perception of harm that can be caused either due to defamation of religion or promotion

[476] Sorabjee, "Freedom of Expression"; Dhavan, *Publish and be Damned*.

[477] Mehta, "Passion and Constraint," 332.

of religious hatred. The overall approach of the court favours governmental intervention, more so in terms of proscription and bans, than criminalizing individual acts of violation. The claim of religious offence receives a much more favourable response than do the claims of freedom of expression.

In the second part of the chapter, I discussed why the courts prioritize protection from religious offence and liberally allow government censorship. I developed two arguments in this regard – firstly, the importance that the courts lend to the subject of public order, and the perception of the court that religious offence have very high tendency to harm social tranquillity; secondly, the courts' arguments regarding preserving the secular values of the constitution, whereby it holds that the state is obliged not only to protect all religion from harm, but also to create conditions so that freedom of conscience and religion are exercised unhampered. These reasons become the basis on which the court justifies protection of religious sensibilities of citizens against assault in the name of freedom of speech and expression.

In the next chapter, I examine the role law and legal process play in the process of censorship. The aim is to shift from the philosophy of the court in such matters, as discussed in this chapter, to the practise of law, in order to get the complete picture about what happens in the cases of publications that are claimed to be religiously offensive, or inciting religious hatred.

CHAPTER 5

LAW AND LEGAL PROCESS AS HURDLES TO FREEDOM OF SPEECH AND EXPRESSION

1. Introduction

In May 2015, PEN Canada and International Human Rights Programme, University of Canada's Faculty of Law produced a report titled *Imposing Silence: The Use of India's Laws to suppress Free Speech*.[478] The report argued that "vague overboard laws" and a "corrupt inefficient justice system" have given rise to an environment in India where free speech can easily be censored. It further discussed the regulatory framework used by government officials, individuals, and social and religious groups, in order to curtail freedom of expression. The report looked at various aspects of the legal process that account for the diminishment of freedom of speech in India. Issues ranging from filing of criminal charges and civil suits, the role of police and judicial corruption, and on to questioning the competence of the judiciary to hear cases on the subject were examined. On the one hand, the report discussed the limiting attitude of Indian law and judicial process, and on the other hand, based on a comparative analysis with international legal provisions it criticized India's position in protecting freedom of speech and expression. The report also forwarded a list of suggestions, which included issues such as reform in the police and judiciary, and scrapping as well as amending significant statutory laws. The sentiment embodied in the report has also been reflected earlier by scholars like Lawrence Liang[479] and Sohini Ghosh[480], among others, who believe that the real threat to freedom of speech and expression in the Indian context emanates from the "slippery

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[478] The report is available on PEN International's website. See, Report by PEN International and International Human Rights Program (IHRP), Department of Law, University of Toronto, *Imposing Silence: The Use of India's Laws to Supress Free Speech*, www.pen-international.org/wp-content/uploads/2015/05/ Imposing-Silence--FINAL.pdf.

[479] Liang, "Reasonable Restrictions," 439; Also see, Liang, "Love Language."

[480] Ghosh, "Censorship Myths," 453.

slope"[481] effect produced by the legal provisions. They recommended repealing of laws like section 153(A) and 295(A) in order to prevent misuse. For example, Liang argued that "once you have a law that allows for the making of legal claims on the basis of charged emotional states, you begin to see the emergence of cases that steadily cultivate a legal vocabulary of hurt sentiments."[482] It is in this sense that Ahmed notes that attempts to "regulate wounded attachments and religious passions" through law may "conversely constitute them." Such legal construction of "offence," Ahmed argues, gives space to "social groups to organize in order to ensure the state takes cognizance of blasphemous events and practices".[483] Though the slippery slope argument forwarded by these scholars holds strong ground, it fails to explain how it is a unique phenomenon attached to laws governing freedom of speech and expression. Any law can be misused in case the executive is not sensitive to its usage. Further, the criticism of law forwarded by these scholars does not take into account the responsibility of the judiciary as interpreter of law in drawing the boundaries of the legal discourse. The analysis therefore suffers limitations.

In this chapter, I highlight the operative and functional inadequacies attached to the legal process, including the role of judiciary that impacts free speech cases. I argue that lacunae in the procedural and functional aspects of the working of law have together contributed in strengthening the role of non-state actors in cases related to censorship. These weaknesses have inspired the claimants of hurt sentiments to approach the legal route as a means to censor free speech. On the other hand, the labyrinth of law and legal process produce an environment of fear and confusion for authors/publishers. Their struggle to defend freedom of speech and expression are setback due to the insecurities and uncertainties surrounding the legal process and system. It may even result in their surrender to the demands of censorship by non-state actors, in order to escape the long

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[481] The idea of "slippery slope" in relation to freedom of speech and expression has been an important argument for extreme freedom. It assumes that if laws are made to constrain such freedom it can be misused in different ways to hurt the core of the value enshrined in freedom of speech and expression.

[482] Liang, "Love Language or Hate Speech."

[483] Ahmed, "Spectre of Macaulay," 177.

and exhausting legal process. The fissures in the law and legal process, therefore, act as constraints upon the free exercise of freedom of speech and expression.

In the first two sections of this chapter, I discuss the procedural and the operative dimensions of the legal process which impact free speech cases. The procedural dimensions relate to those aspects of law's working which are not directly related to the functioning of the court but still have severe ramifications on the overall judicial experience of the authors/publishers who reach the court, either defending their freedom of speech and expression, or being criminally charged for offending the religious sentiments of others. In this section I discuss three such dimensions: a) the phenomenon of "spurious charging" and "overcharging"; b) the liberty of the complainant to lodge a case in any part of the country; and c) the issue of delay in judgment. These aspects pave the way for harassment of the author/publisher in different forms. This may range from the issue of financial burden in order to pay for advocates in lengthy judicial process, to psychological distress produced by multiple appearances in the courts. In the second section of the chapter I discuss the functional dimension of legal process that act as hurdle to freedom of speech and expression. Here I concentrate primarily on the handling of the free speech cases in the court rooms. I show that the experience of case laws related to free speech indicate that the approach of the judiciary, both at the High Court and the Supreme Court, towards free speech cases have only added to the already existing ambiguity related to the language and the interpretation of the statutory laws governing freedom of speech and expression cases. The analysis in the two sections is based on a study of thirty two court cases related to contentious books, claimed to be religiously offensive during the period 1947-2010. It includes an extensive list of cases drawn from All India Reporter (AIR) and other records. I have tried to include almost all the court cases on the subject but have primarily concentrated on those cases which recur in discussions in the courtrooms as well as in the written judgments as precedents. Though I do not claim that the list of cases is exhaustive, I am convinced that it represents the most important cases on the subject, and consideration of this set of cases provides a clear sense about the trends that I want to highlight as part of my argument in this chapter.

In the last part of the chapter, the case of pulping of Wendy Doniger's book *The Hindus: An Alternative History* by its publisher Penguin is used as an example to illustrate how the uncertainties attached to law and the legal process act as hurdle in the free exercise of freedom of speech and expression. On the other hand, such uncertainities also act as a motivation for non-state actors to use legal recourse against publications they consider offensive to their religious sentiments. Both these aspects converge together, I argue, to create an environment for "public self-censorship."[484]

2. The Procedural Dimensions of Legal Process as Hurdle to Freedom of Speech and Expression

The procedural dimensions refer here to both the process through which the cases related to contentious publications arrive in the court room as well as the procedural aspects of functioning of the courts. In this section I highlight three important issues that impact freedom of speech and expression in significant ways, and ensure that directly or indirectly the legal process acts as hurdle in its free exercise. This includes the following issues: i) spurious charging and overcharging; ii) the tendency to file case against the author/publisher in different parts of the country; and iii) the delay in administering justice. The first two aspects are related to pre-courtroom hurdles but once the case reaches the stage where formal legal process begins the courts invariably take a long period of time to deliver judgment. All these factors contribute in a general sense to making the process itself a form of punishment for the author/publisher, thereby demoralizing and dissuading them from seeking legal recourse when such freedom is curtailed by either the state or non-state actors.[485] On the contrary, the legal

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[484] This concept was developed by Philip Cook and Conrad Heilmann. See, Cook and Heilmann, "Two Types of Self-Censorship," 178-196. They differentiated between public and private self-censorship based on who the censors and who the censee were.

[485] See, Dhavan, *Publish and be Damned*, 223. Dhavan calls this phenomenon "Process as Punishment", to explain how the long legal process harasses authors/publishers/painters who are targeted by the socio-religious groups, who in the name of hurt sentiments create hurdles for their freedom of expression. The sense of alienation from the legal process is reflected in the fact that some authors/publishers, as in Wendy Doniger's case (discussed later in the chapter) agree for out-of-court settlement of the issue with the non-state actors.

process becomes an easy option for non-state actors to harass the author/publisher and to force them to agree to their demands for censorship.

2.1. Spurious Charging and Overcharging

The phenomenon of spurious charging and overcharging are related to vagueness of law as well as the tendency among government authorities to react under pressure and act in order to avoid immediate threats to public order. Spurious charging refers to instances where the police register cases under different sections of laws without being sure about the legal validity of such laws in the cases. Overcharging includes framing multiple accusations in a single case. It may result in charges being framed against authors and publications under sections of law which might not even be relevant in that case. The vagueness of both constitutional and statutory laws regarding freedom of speech and expression, disallow the policeman to be sure about which laws should be invoked in a particular case. To add to it, the pressure exerted by the groups, who claim that their religious sentiments are hurt by the publications, leaves it as the legal prerogative of the executive to decide upon the sections to be invoked, and to register a FIR (First Information Report) on that basis. One of the aspects about statutory laws governing freedom of speech and expression in India, as many legal scholars have also noted, is that the kind of offences that fall under their purview are "cognizable," and "non-bailable."[486] This means that the government officials do not require any form of prior approval either from the state government or the judiciary to act in such cases. Further, the "non-bailable" nature of offence ensures that the accused has to face trial and can only be granted bail after the matter is debated in the court. So, the investigation and opinion of the officer on duty becomes central in such cases, which might be affected by the pressure being asserted by the complaining party. Legal commentators have observed that the police use these provisions as tools to avoid any kind of altercation in the public order situation arising

[486] Important statutory laws like 295 (A), 153 (A), and 505 (2), fall under this category. See, Narrain, "Harm in Hate Speech Laws," 41-42; Bhatia, *Offend*, 139-145.

due to contentious publications. At the same time it also ensures that even if all the charges against the publication and the author/publisher do not stand in the court of law, the accused party could still be found guilty under some section of the law.[487] A study of the 32 cases (mentioned earlier), related to publications considered as vilifying religious sentiments, shows that in most of the cases where criminal charges were invoked, the executive accused the guilty of violating multiple sections of the penal codes. In most of the cases, section 153(A) was invoked together with sections 295(A) and 298. It was left to the judiciary to decide whether the case fell within the legal brackets defined by any of these provisions. In the courtroom, the judges pronounced their verdict based on their assessment of each of these sections under which the author or publisher was charged. In most of the charges framed, the courts found the publishers and authors not guilty. Further, as the accusation against the publisher/author under criminal charges, and the case of forfeiture of their publication, form two different cases, the publishers/authors have to appear for trials in both these cases separately.[488] This meant extra expenditure both in terms of time and resources for the authors and publishers to defend their position.

2.2. The Liberty to lodge Case against the Book or Author/Publisher in any part of the Country

The Code of Civil Procedure, 1908 under section 19 allows that a case may be instituted either in the jurisdiction in which the defendant resides or carries on business or where tort was committed. This means that a book published in India in any part of the country irrespective of the place where the author/publisher reside, or where the work was indeed published, could be accused of the hurting sentiments of

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[487] Dhavan, *Publish and be Damned,* 145. This aspect has also been presented in the report *Imposing Silence*, 32-33.

[488] The criminal charges fall under "cognizable" and "non-bailable" offence so the legal process is integral to the nature of offence; whereas, in cases of forfeitures, it is the prerogative of the author/publisher to approach the court under section 96 of CrPC, if they want the notification be revoked and publication should be relieved of charges.

people in any other part of the country, wherever the publication may have been made available. On this basis, a case could be filed in the local court or a complaint lodged in the local police station of that area. It further means that if an author resided in Delhi, and such complaints or cases were lodged against him/her in Mumbai, he/she would have to visit the courts in the state of Maharashtra to defend him/herself. Take for example, the case of Historian D. N. Jha's book *Holy Cow: Beef in Indian Dietary Conditions*. Even before the book was officially released, it became controversial with regard to its subject matter.[489] Jain Seva Sangh, a Hyderabad based organization dedicated to the propagation and protection of Jainism, filed a civil suit against the author and CB Publishers, the publisher of the book, in a civil court in Hyderabad. The author, who was a Professor at the University of Delhi, had to travel to Hyderabad to appear in the court, in order to defend his position.[490] Similarly, in the controversy over the NCERT textbook on History (discussed in chapter 4), the petition was filed in the Punjab and Haryana High Court, and historian Bipan Chandra, who was one of the respondents in the case and was based in Delhi, had to appear in the court at Chandigarh, each time he was summoned. This legal provision therefore becomes a source for harassment if it is used against any author/publisher. At times, as has been demonstrated by legal scholar Rajeev Dhavan, this legal provision is used consciously by non-state actors, who claim hurt sentiments due to the publication, to put pressure on the author/publisher, so that they render submission to the alleged demands of the non-state actors.[491]

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[489] The book discussed, with the help of historical evidence, how beef had been an essential component of Indian dietary habits since ancient times; and this practise, he argued, was present among all religions, including Hinduism, Jainism and Buddhism. Before the book was released, a Member of Parliament from the right-wing BJP, R. S. Rawat, wrote to union Home Ministry demanding a ban on the book and the arrest of the author and publisher. See, "Book on beef eating runs into trouble," *Hindu*, August 9, 2001.

[490] Sheela Reddy, "A Brahmin's Cow Tales," *Outlook*, September 17, 2001. The court issued a temporary stay on the publication of the book. Though, the stay was lifted after a year of judicial process, the publisher, fearing further controversy, and prosecution, refused to publish the book. As a result Jha had to look for another publisher and the book was published later by London based Verso publishers, under a new title, *The Myth of the Holy Cow*.

[491] Dhavan, *Publish and be Damned,* 173.

2.3. The Issue of Delay in Judgment

The amount of time each case takes in the Indian judicial process has been a significant concern for the justice delivery system.[492] In the case of contentious publications, this delay also means that the relevance of the publication declines with time. In order to understand the delay in the courts I examined a data set of 32 cases related to both punitive and preventive laws that appeared in the High Courts and the Supreme Court during the period 1947-2010. These cases were related to publications that were deemed controversial owing to their comments on religious subjects. From the table given below, which indicates the Date, Month and Year (based on availability) of government notification or registration of case, and the date on which the High Court or the Supreme Court delivered the final judgment in the case., it is clear that on an average it took 2.63 years for the High Court to deliver judgement in all such cases, with an average of 2.35 years in cases under section 96 of CrPC[493] (which is related to challenge against proscription order of the state), and an average of 3.06 years for cases under section 295(A) and section 153(A) (is related to criminal charges against the author or the publisher). The time taken by the High Court varies from 1 month in a case to 7 years 2 months. Similarly, if the case is further appealed in the Supreme Court, the average time taken for a final judgement on the subject is 6.87 years. This data clearly reflects that the legal process is exhausting. The fact that in each case the court judgment finally arrives after several rounds of hearings, where both the plaintiff and the accused need to be present, means that it is a constant source of difficulty for the author or publisher who wishes to defend him/herself or his/her work. This process requires both- the expenditure on advocates who argue the case in the courts, as well as the loss of valuable time for the author/publisher, since whereby he/she has to be present in the courts for the hearings – which as my evidence indicates, can continue for years.

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[492] This is not unique to cases related to the subject of freedom of expression cases. There have been various reasons cited for such delay like number of judges in the judiciary among others. For details on such concerns see, Law Commission of India's 77th Report titled, *Delay and Arrears in Trial Courts*, November 1978, lawcommissionofindia.nic.in/51-100/report77.pdf; Nick Robinson et al., "Interpreting the Constitution: Supreme Court Constitution Benches Since Independence," *Economic and Political Weekly* 46, no. 9 (2011), 27; Abhinav Chandrachud, "An Empirical Study of the Supreme Court's Composition," *Economic and Political Weekly* 46, no. 1 (2011), 71-78.

[493] Note that the maximum time allowed for a complainant to file case against the government's notification for forfeiture is two months since the notification order is made public.

Table 1: Includes list of cases, the law primarily invoked in the court in each case, year of issuance of notification, date of delivery of final judgment and the time taken by the courts in each case

S.No.	Case	Section of IPC/CrPC (primary charge as invoked in court)	Year of Notification/ Order of arrest	Date of Final verdict at High Court	Date of Final verdict at Supreme Court	Time taken in High Court	Time taken in Supreme Court
1.	Shiv Ram Dass Udasin *v.* The Punjab State	99(A) {equivalent to 95 of current CrPC}	29/02/1952	05/04/1954	NA	2 years 2 month	
2.	Ramji Lal Modi *v.* The State of UP	295(A) IPC	12/12/1952	25/10/1956	05/04/1957	3 years 10 month	4 years 4 month
3.	Harnam Das *v.* State of Uttar Pradesh	99(A) CrPC	30/07/1953	07/05/1957	27/04/1961	3 years 10 month	7 years 9 month
4.	N. Veerabrahm-am *v.* State of Andhra Pradesh	99(A) CrPC	23/03/1958	12/03/1959	NA	1 years	
5.	Baba Khalil Ahmad *v.*The State	99(A)	1956 (Only year mentioned)	20/04/1960	NA	4 years	
6.	The State of Mysore *v.* Henry Rodigues and Another	295(A)	January 1959	11/10/1961	NA	2 years 9 month	
7.	Public Prosecutor *v.* P. Ramasami	295(A)	February 1961	16/10/1963	NA	2 years 8 month	
8.	Mohammad Khalid *v.* The Chief Commissioner, Delhi	99(A)	27/11/1959	10/12/1962	02/03/1967	3 years 1 month	7 years 4 month
9.	Sant Das Maheshwari *v.* Babu Ram Jadoun and others	Writ petition under article 226	27/03/1961	06/02/1968	NA	6 years 11 month	
10.	Ramlal Puri *v.* State of Madhya Pradesh	99(A) CrPC	28/09/1970	24/12/1970	NA	3 month	
11.	Chinna Annamalai *v.* The state of Tamil Nadu	Writ petition	12/02/1971	24/02/1971	NA	1 month	
12.	Babu Rao Patel *v.* State of Delhi	153(A) IPC	March 1968	14/08/1973	21/02/1980	5 years 5 month	11 years 11 month

S.No.	Case	Section of IPC/CrPC (primary charge as invoked in court)	Year of Notification/ Order of arrest	Date of Final verdict at High Court	Date of Final verdict at Supreme Court	Time taken in High Court	Time taken in Supreme Court
13.	State of Uttar Pradesh *v.* Lalai Singh Yadav	99(A) CrPC	08/12/1969	19/01/1971	16/09/1976	1 year 2 month	6 years 9 month
14.	Lalai Singh Yadav *v.* State of Uttar Pradesh	99(A) CrPC	26/08/1970	14/05/1971	NA	9 month	
15.	M/S Varsha Publications Pvt. Ltd. *v.* State of Maharashtra and Others	95 CrPC	31/07/1982	03/05/1983	NA	8 month	
16.	Nand Kishore Singh and etc. *v.* State of Bihar and another	95 CrPC	29/10/1983	04/09/1984	NA	11 month	
17.	Chandmal Chopra *v.* State of West Bengal	Writ petition for proscription under sec 95 CrPC	March, 1985	24/11/1987	NA	2 years 8 month	
18.	Master Aman Preet Singh and others *v.* Govt. of India and others	PIL (Public Interest Litigation) for removal of content	1996	19/04/1996	NA	NA	NA
19.	G. Jairaj and others *v.* State of Karnataka and others	Writ petition to apply section 95	June, 1994	25/07/1997	NA	3 years 1 month	
20.	Baragur Ramchandra-ppa and others *v.* State of Karnataka and another	95 CrPC	27/03/1997	16/04/1998	02/05/2007	1 year 1 month	10 year 2 month
21.	The Trustees of Safdar Hasmee Memorial Trust *v.* Govt. of NCT of Delhi	95 CrPC	21/08/1993	16/07/2001	NA	7 years 11 month	
22.	Zac Poonen *v.* Hidden Treasure Literature	295(A) IPC	1998	27/07/2001	NA	3 years	
23.	Yashwant Venilal Sanghvi *v.* Sahdevsinh Dilubha Zala	295(A) IPC	January, 2004	16/08/2004	NA	1 year 7 month	

S.No.	Case	Section of IPC/CrPC (primary charge as invoked in court)	Year of Notification/ Order of arrest	Date of Final verdict at High Court	Date of Final verdict at Supreme Court	Time taken in High Court	Time taken in Supreme Court
24.	Sujato Bhadra *v.* State of West Bengal	95 CrPC	28/11/2003	22/09/2005	NA	1 year 10 month	
25.	State of Maharashtra and others *v.* Sanghraj Damodar Rupawate and others	95 CrPC	20/12/2006	26/04/2007	09/07/2010	4 month	3 year 7 month
26.	R. V. Bhasin *v.* 2 Marine Drive Police Station	95 CrPC	09/03/2007	06/01/2010	NA	2 years 8 month	
27.	Prasad Jacob (US citizen) *v.* State of Kerala	153(A) IPC	29/03/2010	06/04/2010	NA	1 month	
28.	Manzar Sayeed Khan *v.* State of Maharashtra	153(A) IPC	23/02/2004	06/05/2004	05/04/2007	3 month	3 years 2 month
29.	Hulikal Nataraju *v.* State of Karnataka	PETITION- 153(A) IPC	27/02/2006	13/09/2010	NA	4 years 7 month	
30.	Father C. R. Prabhu *v.* State of Jharkhand and another	PETITION- 153(A) IPC	11/06/2010	09/04/2013	NA	2 years 10 month	
31.	Maninder Singh and another *v.* State of Punjab and another	295(A) IPC	09/09/2010	02/08/2013	NA	2 years 11 month	
32.	Piara Singh Bhaniara *v.* State of Punjab and another	95 CrPC	27/09/2001	11/11/2008	NA	7 years 2 month	

3. The Functional Dimensions of Legal Process as Hurdle to Freedom of Speech and Expression

The issues discussed in the previous section are not unique to cases related exclusively to freedom of speech and expression, but form part of the legal process in general. The attempt has been to show how these issues impacts the author/publisher against whom the accusations are filed, or who seek to defend their publication against government's action. In the present section I highlight functional aspects of the courts that act as impediments against cases related specifically to freedom of speech and expression and particularly related to contentious publications. Two issues that will be discussed in this section are: i) The low importance rendered to the cases related to freedom of speech and expression by the courts; and ii) inconsistency in judgments creating confusion regarding precedent thereby encouraging high degree of subjectivity.

3.1. Court's Interest in Free Speech Cases

Abhinav Chandrachud in a recent study of free speech cases in the Supreme Court has shown that these cases don't fall under "high priority" status on the docket of the Supreme Court of India.[494] Chandrachud undertook a quantitative study of 107 cases related to freedom of speech and expression under section 19(1)(a) untill November 2011. The conclusions were based on a set of structural and behavioural observations related to the treatment of these cases in the apex court. Structural observations included such aspects as instances where the Chief Justice formed part of the judgment bench, and size of the panel which heard the cases. As is the general trend, the Chief Justice forms the panels for each case, and it is argued by legal scholars that he forms a part of those panels which he considers involve the most important cases.[495] Chandrachud's study shows that Chief Justices have formed at part of the panel of judges only in 40.1% cases related to

[494] See, Abhinav Chandrachud, "Speech, Structure, and Behavior on the Supreme Court of India," *Columbia Journal of Asian Law* 25, no. 2 (2012), 222-74.

[495] Robinson, et al., "Interpreting the Constitution," 31. Robinson argues that the apex court in India are "Chief Justice-dominant" and highlights the important role that Chief Justice plays in the court.

free speech, and the possibility of the Chief Justice forming a part of such panel has significantly declined over years – from a high of 85.7% during the 1950s down to just 3.8% during the period 2000-2010. Similarly, Chandrachud shows that the size of panel for hearing such cases is extremely small and at most times it was a two member bench that heard cases related to free speech (in 44.8% cases). Constitutional benches of five or above are a rarity in such cases.[496] These observations conform to Nick Robinson's assessment about the size of Supreme Court benches in all cases related to constitutional subjects. While scholars tend to agree that the smaller size of benches could also be due to the increasing number of cases, they also are unanimous in the view that whenever a particular case is held to be important, it is referred to a larger bench.[497] The behavioural observations that Chandrachud gleans in his study include aspects like the judges' voting pattern in each case and the registry of concurring and dissenting opinions. A large degree of homogeneity and a smaller number of dissents or concurrence statements is traced back to the idea that the degree of deliberation is less compared to other cases and also seen as an indication that other judges concur with the senior-most judges' views, who is most often responsible for writing the judgment on behalf of the bench. So, Chandrachud shows that in 51.4% of cases related to freedom of speech and expression, the senior judge writes the judgment on behalf of the bench; and only in 15.8% of cases do we find evidence of concurring judgments by other judges; and in only 10. 2% cases where dissenting opinion were registered. These findings of Chandrachud are indicative of the importance the apex court attaches to free speech cases. I applied a similar method to test if the conclusions reached were in conformity with studies of scholars like Robinson and Chandrachud. However, my own data set – which includes both Supreme Court as well as High Court cases – differs from studies by Robinson and Chandrachud, which only examine cases heard in the Supreme Court. Further, I have focused only on cases related to contentious publications on religious grounds, unlike Robinson who provided a detailed study about constitution benches in Supreme Court, or Chandrachud who worked with all cases related to section 19(1)(a).

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[496] As article 145(3) of the Indian Constitution suggests, the "minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law," has to be five.

[497] Robinson, et al., "Interpreting the Constitution," 27-31.

My own research suggests that Chandrachud's and Robinson's observations were indeed applicable even to free speech cases in High Courts. For example, in my study of 32 cases (as reflected in the table below), the Chief Justice formed part of the bench only six times, once in the Supreme Court and five times in High Courts. However, my conclusions about the size of the Court benches differ from other studies. Section 96 makes it mandatory that any case where the proscription notification of the government is challenged, a bench of three High Court judges will hear such pleas and therefore most of the cases in my study consisted of three judges. But in other cases, the benches consisted of either one or two judges, with only two instances where the case was sent for hearing to a bench consisting five members (both times in the Supreme Court in years 1957 and 1961). So, Chandrachud's observation that the sizes of benches hearing free speech cases are usually small is also borne out by my own research. Similarly his points about behavioural aspects are equally valid. I found that only in five instances (all in the High Courts) did judges other than the one who wrote the judgment registered their concurrence, and in only two instances (both in High Courts) did the other judge dissented. In only five such cases where the opinion was registered, it was supported by a detailed explanation of the judges' position. The list of cases where concurrence by other judges was registered includes: *Nand Kishore Singh*, *Shiv Ram Dass Udasin*, *Baba Khalil Ahmad, N. Veerabrahmam*, and *Sujato Bhadra*. Out of these, in *Shiv Ram Dass Udasin* and in *Baba Khalil Ahmad*, only the concurrence of the other judges was registered, without any explanation. The two cases where a dissenting opinion was registered included one in the Andhra High Court by Justice Bheemshankaran in *N. Veerabrahmam*, and another in the Supreme Court by Justice Das Gupta in *Harnam Das* case. In all other cases the judges preferred either to remain silent or were completely convinced both by the opinion of the judge writing the judgment and by his grounds for forming that opinion. The statement of concurrence or dissent is important because it helps us to understand why the judges agreed or disagreed with the judge who pronounced the judgment. It can add to the description of the case and also suggest the grounds on which the judgment was arrived. A complete silence on the part of other judges does not contribute to the analysis of the judgment in any way, and also indicates that the other judges might not have taken equal interest in the case as the judge who was expected to write the judgment on their behalf. So based on earlier studies like that of Chandrachud and Robinson, and their appositeness to my own analysis, it is indicative that cases related to freedom of speech and expression do not attract particular interest from the judiciary.

Table 2: Including details of cases along with size of bench, presence of Chief Justice and whether it included opinion of judges other than the one who wrote the judgment.[498] Years mentioned in the table are according to the year the final judgment was delivered.

S.No.	Case & year of controversy	Sections of statutory laws invoked	Size of bench of judges hearing the case	Was the Chief Justice a part of the panel? (Yes/No)	Whether judges other than the one writing judgment register their oncurrence/dissent?
1.	Shiv Ram Dass Udasin *v.* The Punjab State (1954)	Section 99(A) (Currently section 95)	3	No	Yes. Only agreement, no explanation
2.	Ramji Lal Modi *v.* The State of UP (1956)	Section 295(A) IPC	5	Yes	No
3.	Harnam Das *v.* State of Uttar Pradesh (1957)	Section 99(A) (Currently section 95)	5	No	Yes. Each judge expressed their opinion and explanation
4.	Harnam Das *v.* State of Uttar Pradesh (1961)	Section 99(A) (Currently section 95)	3	No	No
5.	Baba Khalil Ahmad *v.* The State (1960)	Section 99(A) (Currently section 95)	3	No	Yes. Only agreement, no explanation
6.	N. Veerabrahmam *v.* State of Andhra Pradesh (1959)	Section 99(A) (Currently section 95)	3	Yes	Yes. Each judge expressed their opinion and explanation
7.	The State of Mysore *v.* Henry Rodigues and Another (1961)	Section 295(A) IPC	2	No	No
8.	Mohammad Khalid *v.* The Chief Commissioner, Delhi (1967)	Section 99(A) (Currently section 95)	3	No	No
9.	Public Prosecutor *v.* P. Ramasami (1963)	Section 295(A) IPC	1	No	NA
10.	Sant Das Maheshwari *v.* Babu Ram Jadoun and others (1968)	Section 295(A) IPC & Section 95	2	No	No
11.	Babu Rao Patel *v.* State of Delhi (1973) (in High Court)	Section 153(A)	1	No	NA

[498] The data set is of 32 cases. However the difference in serial number is because in three cases, I have also included the data of the same cases appearing both in the High Court as well as Supreme Court.

S.No.	Case & year of controversy	Sections of statutory laws invoked	Size of bench of judges hearing the case	Was the Chief Justice a part of the panel? (Yes/No)	Whether judges other than the one writing judgment register their oncurrence/dissent?
12.	Babu Rao Patel *v.* State of Delhi (1980) (in Supreme Court)	Section 153(A)	2	No	No
13.	State of Uttar Pradesh *v.* Lalai Singh Yadav (1976)	Section 99(A) (Currently section 95)	3	No	No
14.	Lalai Singh Yadav *v.* State of Uttar Pradesh (1971)	Section 99(A) (Currently section 95)	3	No	No
15.	Ramlal Puri *v.* State of Madhya Pradesh (1970)	Section 99(A) (Currently section 95)	3	No	Yes. Each judge expressed their opinion and explanation
16.	Chinna Annamalai *v.* The state of Tamil Nadu (1971)	Section 99(A) (Currently section 95)	3	No	No
17.	M/S Varsha Publications Pvt. Ltd. *v.* State of Maharashtra and Others (1983)	Section 95	3	Yes	No
18.	Nand Kishore Singh and etc. *v.* State of Bihar and another (1984)	Section 95	3	Yes	Yes. Each judge expressed their opinion and explanation
19.	Chandmal Chopra *v.* State of West Bengal (1987)	Section 95	2	Yes	Yes. Each judge expressed their opinion and explanation
20.	The Trustees of Safdar Hasmee Memorial Trust *v.* Govt. of NCT of Delhi (2001)	Section 95	3	Yes	No
21.	G. Jairaj and others *v.* State of Karnataka and others (1997)	Section 95	2	No	No
22.	Baragur Ramchandra-ppa and others *v.* State of Karnataka and another (1998) (in the High Court)	Section 95	3	No	No
23.	Sri Baragur Ramchandra-ppa and others *v.* State of Karnataka and another (2007) (in Supreme Court)	Section 95	2	No	No

S.No.	Case & year of controversy	Sections of statutory laws invoked	Size of bench of judges hearing the case	Was the Chief Justice a part of the panel? (Yes/No)	Whether judges other than the one writing judgment register their oncurrence/dissent?
24.	Master Aman Preet Singh and others *v.* Govt. of India and others (1996)	Section 95	2	No	No
25.	Zac Poonen *v.* Hidden Treasure Literature (2001)	Section 295(A), 505, 508 IPC	2	No	No
26.	Piara Singh Bhaniara *v.* State of Punjab and another (2008)	Section 95	1	No	No
27.	Sujato Bhadra *v.* State of West Bengal (2005)	Section 95	3	No	Yes. Each judge expressed their opinion and explanation
28.	Yashwant Venilal Sanghvi *v.* Sahdevsinh Dilubha Zala (2004)	Section 295(A), 505, IPC	1	No	NA
29.	Manzar Sayeed Khan *v.* State of Maharashtra (2007)	Section 153, 153(A), 34 IPC	3	No	No
30.	State of Maharashtra and others *v.* Sanghraj Damodar Rupawate and others (2010)	Section 95	2	No	No
31.	Hulikal Nataraju *v.* State of Karnataka (2010)	Section 153, 153(A) IPC	1	No	No
32.	R. V. Bhasin *v.* 2 Marine Drive Police Station (2010)	Section 95	3	No	No
33.	Prasad Jacob (US citizen) *v.* State of Kerala (2010)	Section 153(A) IPC	1	No	No
34.	Father C. R. Prabhu *v.* State of Jharkhand and another (2013)	Section 153(A) IPC	1	No	No
35.	Maninder Singh and another *v.* State of Punjab and another (2013)	Section 295(A) IPC	1	No	No

3.2. The Problem of Conflicting and Confusing Precedents

One of the pressing problems related to the courts' position on freedom of speech and expression cases has been the issue of conflicting and confusing precedents. The "doctrine of precedent" allows the courts to provide a legal framework for individuals to plan their lives and take decisions based on settled laws. The absence of a settled precedence related to law invokes a context of confusion and doubt. Further, lack of coherence also undermines the rule of law whereby two litigants are not treated equally. This makes the operation of the law unequal and uncertain.[499] The conflicting precedents in the higher courts also cascade down to the lower courts, and have significant impact on the decisions taken at the level of lower courts. Confusion and indeterminancy tend to produce two lines of precedents, which lead to unpredictability of outcomes of the cases. In the present section I shall focus on this aspect of the courtroom to discuss the broad themes around which such cases are dealt with in the courtroom, in order to make evident the space for creative interpretation that such differences allow. In order to highlight inconsistency, I present an analysis of the same 32 cases as mentioned in the table earlier.

The debates and decisions of the courts on various cases of censorship can be categorized into two types. Firstly, the cases where the court looked into the procedural aspects as mentioned in section 95 of CrPC. This includes the operative aspect about justification of government's action, as well as the scrutiny of the basis on which decisions are made. Second, there are the cases where the court examined the validity and applicability of the government's action in the light of the publication in question. This has often included an evaluation of the order of the state government based on the evidences presented. It largely revolves around the questions of "intention" of the author or *mens rea*, the nature of the subject dealt in the book, and the assessment of the method employed in making sense of the book's contents. On all these above mentioned grounds, the courts have had diverse opinions, which have resulted in similar

[499] Pratap Bhanu Mehta, "India's Judiciary: The Promise of Uncertainty," in *Public Institutions in India: Performance and Design*, ed. Devesh Kapur and Pratap Bhanu Mehta (New Delhi: Oxford University Press, 2005), 158-93. Also see, Arghya Sengupta, "Inconsistent Decisions," *Frontline*, May 3, 2013.

books meeting quite different fates – which has only served to increased ambiguity about a settled position. A more detailed analysis will show the range of variance.

3.2.1. *The Operative Part of Government's Action*

The courts have generally held that it is the state government's prerogative to decide whether it believes that a book falls under the prohibitive sections or not. Making its position clear in this respect, the court in *Sri Baragur Ramachandrappa* held that as section 95 was preventive in nature, the government could take action if it pre-empts any danger to public order and there was no need for the actual occurrence of such incidents.[500] This attitude is also reflected in the cases of *Nand Kishore Singh*[501] and *R. V. Bhasin*[502]. Though it is also explicit from the law that under section 95 the state government needs to issue a notification for any ban or forfeiture, there have been diverse opinions about the accepted content of such impugned notifications and in different cases the proscription and forfeiture orders were set aside citing the lack of necessary inclusions in the notification.[503] Through the content of the orders, the court tries to look at the "application of mind" in the decision. In the *Sanghraj Damodar Rupawate* case the Supreme Court held that it was important to mention the grounds on which the government formed the opinion of forfeiture. It should also include the "conclusion of facts" on which opinion was based, so that the court can base its judgment on evaluating those facts.[504] The Andhra High Court further held in the *N. Veerabrahmam* case that it was not the work of the court to make such order of forfeiture, "but only to examine the correctness of any such order made by the government."[505] In *Mohammad Khalid* the Supreme Court extended the net and held

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[500] *Sri Baragur Ramachandrappa*, 5 S.C.C. 11.

[501] *Nand Kishore Singh*, A.I.R. 1986 Pat. 98. In this case the court also made it explicit that the "clear and present danger" doctrine as used in US cannot be applied in the Indian case.

[502] *R. V. Bhasin*, Criminal Application No. 1421 of 2007.

[503] *Harnam Das*, 1961 A.I.R 1662; *M/S Varsha Publications*, Cri LJ 1446.

[504] *Sanghraj Damodar Rupawate*, Civil Appeal of 2010 (Arising out of S.L.P. (C) No. 8931 of 2007).

[505] *N. Veerabrahmam*, AIR 1959 AP 572.

that mere opinion, or grounds of opinion, was not enough. The objecting communities as well as objectionable passages should also be clearly mentioned in order to substantiate the basis of such opinion formation. Any absence of such reference could lead to such notification being set aside.[506] However, quite contrarily, in *N. Veerabrahmam* and *Nand Kishore Singh*, the respective High Courts held that though opinion should be mentioned, an absence of grounds of opinion cannot be reason for not proscribing the book.[507] As under section 99-D (96 of the current CrPC), the court, it was argued, was expected to either uphold or dismiss such decision based on evaluation of the content of the book.[508] The mention of grounds of opinion can therefore only be indicative and not a conclusive aspect of the notification order.

3.2.2. *The Evaluative Aspects of Government's Decision*

The second set of cases in my study involved those where the court evaluated the order of the government in the light of evidence, to find whether the case in question came under the preventive clause of those sections as mentioned in the order. One of the important aspects of all such laws including 153(A) and 295(A) is the presence of "deliberate and malicious intentions" on the part of the author/publisher. Though courts broadly agreed with the necessity of this clause, there are different views about how such intentions could be extracted and about tests that could enable such examination. In different cases the court held that the whole book and not isolated passages should be taken into consideration to make sense of the intention of the author.[509] However, in other cases it was also held that it did not prevent the state from taking decisions based on portions or isolated passages, the validity of which could be later judged by the court.[510]

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506 *Mohammad Khalid*, A.I.R. 1968 Delhi 13.

507 *N. Veerabrahmam*, 1959 A.P. 572; *Nand Kishore Singh*, A.I.R. 1986 Pat. 98.

508 This position was also upheld by Justice Das Gupta in his dissenting note in the case of *Harnam Das*, 1961 A.I.R 1662.

509 *Sujato Bhadra*, 39 A.I.C. 239; *Nand Kishore Singh*, A.I.R. 1986 Pat. 98.

510 *Sanghraj Damodar Rupawate*, Civil Appeal of 2010 (Arising out of S.L.P. (C) No. 8931 of 2007).

Further, in *N. Veerabrahmam*, the Andhra High Court held that the "intention of the author has to be gathered primarily from the language used."[511] It was also mentioned by the Allahabad High Court in *Baba Khalil Ahmad* that if language was problematic, there was no need to look for any other evidences. No defence could stand for vituperative and offensive language.[512] In *Sanghraj Damodar Rupawate* the court extended the test to include content and import of offending passages. So, if passages were drawn from "folklore, tradition or history something in extenuation could perhaps be said for the author."[513] In *Nand Kishore Singh*, the court maintained that only the language, the import of offending passages and the audience to which the book is catered to, should be kept in mind and no other external evidences should be considered.[514] However in *Sujato Bhadra*, the court extensively depended on the external context the book was referring to.[515] The importance of external circumstances was also upheld in *Manzar Sayeed Khan*, where the Supreme Court held that the intention could be derived from the language of the book as well as the circumstances in which the book was written and published.[516] Similarly, in *R. V. Bhasin*, the Bombay High Court observed that the category of audience that the book is addressing and for whom it was intended is equally important to identify the intentions of the author.[517] It would appear, therefore, that there is no fixed criteria about how to make sense about the intention of the author even though this is seen as an important aspect of all such laws.

In many cases the court also held that if the intentions were proven to be deliberate and malicious, even the claims of truth and history could not be used as excuse to defend offensive writings. For example, in *Sanghraj Damodar Rupawate* the Supreme Court

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511 *N. Veerabrahmam*, 1959 A.P. 572.

512 *Baba Khalil Ahamad*, A.I.R. 1960 All. 715.

513 *Sanghraj Damodar Rupawate*, Civil Appeal of 2010 (Arising out of S.L.P. (C) No. 8931 of 2007).

514 *Nand Kishore Singh*, A.I.R. 1986 Pat. 98.

515 *Sujato Bhadra*, 39 A.I.C. 239.

516 *Manzar Sayeed Khan v. State of Maharashtra,* (2009) 12 S.C.C. 157.

517 *R. V. Bhasin*, Criminal Application No. 1421 of 2007.

observed that "if the writing is calculated to promote feeling of enmity or hatred, it is no defence to a charge under section 153(A) of the IPC that the writing contains a truthful kind of past events or is otherwise supported by good authority. Adherence to the strict path of history is not by itself a complete defence to a charge under section 153(A) of the IPC."[518] However, quite contrarily, the Bombay High Court argued in the *M/S Varsha Publications* case that these sections should not be extended so far as to affect historical research or writings criticizing religions. The court maintained:

> Different considerations will prevail when we are to consider a scholarly article on history and religion based upon research with the help of a number of reference books. It will be very difficult for the State to contend that a narration of history would promote violence enmity or hatred. If such a contention is accepted a day will come when that part of history which is unpalatable to a particular religion on the pretext that the publication of such history would constitute an offence punishable under S. 153A of the I.P.C.[519]

Another test that the courts use is of "reasonability," which means that the impact should not be judged on the basis of the reaction that is expected out of a believer or an emotionally invested person, rather the effect is "to be judged from standard of reasonable, strong minded, firm and courageous."[520] So, only works which are considered "grossly offensive to reasonable man" should be eligible for proscription or forfeiture.[521] However in *Baba Khalil Ahmad*, the court held that if the content was insulting to some sacred figure, it naturally led to a feeling of offense for its followers and hence the content itself should be the guide in the subject. Also in *Baragur Ramachandrappa,* the Karnataka High Court made it explicit that "we are concerned with impact of the book on the minds of ordinary people with religious beliefs and not discerning intelligentsia."[522]

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518 *Sanghraj Damodar Rupawate*, Civil Appeal of 2010 (Arising out of S.L.P. (C) No. 8931 of 2007).

519 *M/S Varsha Publications*, Cri LJ 1446.

520 *Sanghraj Damodar Rupawate*, Civil Appeal of 2010 (Arising out of S.L.P. (C) No. 8931 of 2007).

521 *Shiv Ram Dass Udasin,* A.I.R 1955 P H 28.

522 *Baragur Ramachandrappa*, 1998 CriJL 3639.

The above discussions show that the jurisprudence relating to the ban and forfeiture of publications has been chaotic to say the least, and leaves considerable room for subjectivity of judges.[523] In similar cases, the courts have used quite different yardsticks and have come up with starkly opposite and irreconcilable conclusions. Such inconsistency has significant consequences, both in terms of principles as well as practical aspects. Its impact on the principle of precedents has already been discussed. In practical experience, it encourages non-state actors to exert pressure on state governments to issue ban orders. In the absence of a clear mandate on the subject, the magistrate and the state government consider it better to act against the publication, the validity of the action being left to be decided in the court. Dhavan views this as "problem solving" politics, whereby, the government "solves" the problem of social pressure by imposing the ban, and the court later provides the "legal" solution by taking decision on the ban.[524] The lack of clarity of the judiciary's position on the subject also encourages non-state actors to file criminal cases against authors/publishers in the hope that the court's verdict could run in their favour. From the perspective of the author and publisher, both these strategies are particularly intimidating. There is a constant fear of loss of civil liberty, punishment, and even imprisonment. Add to this the tiring legal process including the duration for verdict, which may take decades, and the whole experience in itself can be like a punishment. Even after all that, one can never be sure about which side the court's decision would go. All these facts collate to produce an environment where courts and the legal process in general cannot be considered to be particularly favourable to the claimants of freedom of speech and expression. The tough and exhaustive legal battle in a judiciary where free speech cases are not high in the docket of cases and which works in the context of a lack of conclusive precedent, can have a lasting impact on the experience of authors/publishers defending their freedom of expression.[525] This also creates an environment of fear and uncertainty where the author/publisher often chooses to desist from such engagement at the level of judiciary, and instead gives in to the demands of the people who demand censorship either by removing controversial sections or by pulping the publication itself. The case of Wendy Doniger's *The Hindus* is an explicit example.

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523 Dhavan, *Publish and be Damned*, 145.

524 Ibid., 144.

525 This aspect has been discussed widely by the scholars on censorship in India. See for example, Lawrence Liang, "The process is the bloody punishment," *Outlook*, January 25, 2012; Narrain, "Hate Speech," 119-26.

4. The Pulping of Wendy Doniger's *The Hindus: An Alternative History*: A Case Study

On February 10, 2014 the district court in Delhi accepted the settlement agreement between Penguin Books India Pvt. Ltd. and Dina Nath Batra[526] of Shiksha Bachao Abhiyan Samiti. After a legal battle for four years, the publishers of the book, in an out-of-court settlement, succumbed to the demands of Batra. Penguin agreed to "recall and withdraw" all copies of the book from Indian territory with immediate effect. It also promised that it would pulp all the "recalled/withdrawn/unsold copies of the book" at their own cost. In return Batra, agreed to withdraw all the civil/criminal cases/complaints filed against the author or the publishers of the book.[527]

The ordeal surrounding Doniger's book *The Hindus* began in 2010 when Saraswati Research and Education Trust, a right-wing body, started an online petition claiming that the book contained factual errors about the historical past as well as vilification of Hinduism.[528] It highlighted sixteen factual errors including distortion of maps, mistakes in historical accounts and bibliographic inaccuracies among others. It also cited eight passages which it claimed to be highly derogatory, defamatory and offensive to Hindus. These concerns were reiterated in a legal notice sent by Batra to the author and the publishers of the book in the same year.[529] He charged the author and publishers of the book of consciously misrepresenting the Hindu religion by quoting passages from

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[526] Dina Nath Batra is a retired schoolmaster who now heads Shiksha Bachao Andolan Samiti (SBAS), an organization that claims to be dedicated to protecting Indian values and reforming Indian education system. It is considered to be very close to the right wing association RSS.

[527] The copy of the settlement agreement was widely available. The one here is taken from, www.outlookindia.com/article/penguin-to-withdraw-the-hindus-an-alternative-history/289467.

[528] The online petition was started by Saraswati Research and Education Trust and addressed to the CEO and the President of Penguin Group. It was launched on the website www.petitiononline.com. However the website is no more functional since September 30, 2014. But the content of the online petition and the attached letter can be found at www.outlookindia.com/article/the-book-promotes-prejudices-and-biases-against-hindus/289472.

[529] The Legal notice sent by Dina Nath Batra to Wendy Doniger, Penguin Group (USA) Inc. and Penguin Books India Pvt. Ltd., dated March 3, 2010 and Ref. No. 254/LN/0310, available at, www.outlookindia.com/article /your-approach-is-that-of-a-woman-hungry-ofsex/289468.

religious books out of context, distorting facts and providing wrong information. He further claimed that the author also promoted obscenity and vulgarity through images and writings in the books which were aimed to vilify Hinduism. Doniger's approach to the question of religion, Batra argued, was that of a "woman hungry of sex" and the book was written with a "Christian missionary zeal and hidden agenda to denigrate Hindus and show their religion in poor light." The notice asked the author and the publisher to seek an "unconditional apology," "withdraw the said objectionable parts from book", and "undertake not to offend the religious sentiments of the Hindus in future." Failing that, he warned that "legal action under section 153, 153(A), 295(A), 298, 505(2) of IPC" would be initiated and that he would further ask Hindus to "boycott the books published by Penguin Books India Pvt. Ltd."[530] When no action was taken in response to the legal notice, Batra took the author and the publishers to court and filed several civil and criminal suits against them.[531] After battling the court cases for more than four years, the publishers finally decided to give in to the demands of Batra.

The settlement agreement was criticised by several scholars and intellectuals as surrender by the book company to the radical conservative forces thereby weakening the battle for freedom of speech and expression.[532] But here I shall only concentrate on the debates surrounding the legal aspects associated with the case. I argue that the fact that Penguin agreed to succumb to the legal pressure generated by Batra indicated the complex role that law and legal process play in the discourse of censorship. On the one

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530 Ibid.

531 Batra pursued two forms of legal pressure building- civil and criminal. He filed a complaint under criminal charges at Hauz Khas Police Station on April 29, 2010 and another in 2013. On March 19, 2010, he also brought a civil suit in the Saket District Court at Delhi (No. 360 of 2011).

532 There were diverse reactions on the episode. Some commentators claimed it to be another case of an attack on freedom of expression by radical fundamentalist forces. See, Kenan Malik, "Changing landscape of free speech," *Hindu*, February 12, 2014; Ratna Kapur, "Totalising History, Silencing Dissent," *Hindu*, February 15, 2014; "Narrowing Horizons: Withdrawal of Doniger book highlights sway of Taliban-like forces in India," *Times of India*, February 13, 2014. However, most of the commentators believed that it was surrender by the company against such forces that was a more important matter of concern. The incident was followed by several public statements signed by scholars and academicians criticizing Penguin for the act. See for example, "Statement on withdrawal of Wendy Doniger's book issued by Centre of Historical Studies, JNU," available at kafila.org/2014/02/21/chs-jnu-statement-on-the-wendy-doniger-issue/; "SAHMAT Statement on Wendy Doniger's Book," available at www.sacw.net/article 7666.html; Eswaran Sridharan and Anthony Cerulli, "Editor's introduction to the Roundtable on Intellectual Freedom, Vigilantism, and Censorship in India," *India Review* 13, no. 3 (2014), 274-276.

hand it highlights how law and legal process could be used as legitimate tools for censorship by those claiming hurt sentiments, and on the other hand it also shows the vulnerability experienced by authors and publishers when such pressure is exerted. In the process, the practical limits of the theoretical debates surrounding freedom of speech and expression were clearly exposed.

4.1. The Role of Law and the Legal Process in Penguin's Surrender

It was not the first time that Dina Nath Batra was using the legal route to censor historical work which he considered as objectionable. In 2008, Batra on behalf of Shiksha Bachao Andolan Samiti (SBAS) moved the Delhi High Court by requesting it to issue orders to University of Delhi to remove A. K. Ramanujan's essay titled "Three Hundred Ramayanas: Five examples and Three Thoughts on Translation" from its history syllabus taught at undergraduate level.[533] The High Court judges decided not to interfere in the subject as it was an internal matter of the university and also because according to them the court lacked the capacity to judge academic matters. The plea was therefore rejected. But Batra filed another civil suit in the Supeme Court. Hearing the matter in July 2010, the Supreme Court asked the university to set up an expert committee competent to look into the matter. This eventually led to the removal of the essay from the syllabus.[534]

So, Batra had previous experience about how to use legitimate legal means to enforce censorship. Unlike the violent mob that threatened authors or vandalized bookstores, Batra claimed to be a law abiding citizen, and expressed it to be his legal right to raise objections and bring it to the notice of the government and the judiciary if anything denigrating his religious beliefs was published and circulated. Batra's legal counsel Monika Arora, justified his act in an article written in *Organizer*, the mouthpiece of right-wing group RSS. Arora argued that the Indian constitution did not allow for

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533 See, Dina Nath Batra *v.* University of Delhi Laws (DLH) 2008-7-180, decided on July 19, 2008. Also see, A.A. Mahaprashta, "The Rule of Unreason," *Frontline*, November 05-18, 2011.

534 "Delhi University scraps Ramanujan's essay on Ramayana," *Deccan Herald*, October 13, 2011.

unlimited freedom of speech and expression and that "reasonable restrictions" could be imposed, which were to be defined on case to case basis by the judiciary.[535] Therefore, Arora argued that Batra was right in bringing these cases to the judiciary and leave it upto the judges to take decision about the future of such controversial publications.[536] It is evident that people like Batra use law as a potent weapon in their battle against publications they consider hurting their religious sentiments. In fact just after his success in the Doniger case, Batra reportedly sent similar legal notices to other publishers regarding other books that he thought were offensive to Hindus.[537]

An equally important aspect related to such incidents of censorship is the effectiveness of the legal methods. When the above case of settlement between Penguin and Batra became public, legal scholars and practitioners who criticized the company for succumbing to legal threats presented two sets of arguments about why they thought the step was completely unnecessary. On the one hand, some scholars argued that the provisions of Indian law under which civil and criminal charges were registered did not even apply to the case. It was therefore liable to be summarily rejected by the courts. Noorani claimed that Batra was able to win the battle "with a toy gun."[538] He and other commentators like V. Venkatesan[539] believed that Penguin did not receive the right legal guidance on the subject because, as Noorani held, "the High Court is there to ensure such a dismissal even if the District Judge or the Magistrate or the police did not follow the law. If not the Supreme Court would have surely done that."[540] They opined that instead of surrender, Penguin should have continued the legal battle. Another set of

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535 Monika Arora, "Intolerance in the name of Freedom of Expression," *Organizer*, February 23, 2014.

536 Ibid.

537 On March 3, 2014 Batra sent legal notice to Aleph Books demanding that the book company should withdraw another book of Wendy Doniger titled *On Hinduism*. See, "Doniger's book *On Hinduism* put on hold," *Indian Express*, March 11, 2014. In May 2014, he also sent a legal notice to academic publisher to halt the release of Megha Kumar's book *Communalism and Sexual Violence: Ahmedabad since 1969*. See, "Another publisher forced to censor textbooks," *Hindu*, June 3, 2014.

538 A.G. Noorani, "Penguin and the Parivar," *Frontline*, April 4, 2014.

539 V. Venkatesan, "A legal flaw," *Frontline,* March 7, 2014.

540 A. G. Noorani, "Penguin and the Parivar".

legal scholars, like Saurav Datta, claimed that if Penguin would not have given up, it was assured of a legal victory, if not in the lower courts than at least in the Supreme Court.[541] To substantiate this point Datta used cases from Supreme Court where it handed a favourable judgment to authors and publishers in similar cases.

The issues raised by both these sets of commentators are significant. Yet the arguments that were offered by either side do not fully convince. One of the primary limitations of these analyses is that they completely overlook Penguin's point of view. Further, as I shall show, these arguments, especially in the context of Penguin's action, missed some important facts which are significant. Take Datta's analysis – a significant analysis because it was hailed and cited uncritically by various other scholars and journalists.[542] Datta claimed that "the courts have long tradition of protecting freedom of speech by upholding the right to express divergent and alternative views on religions even if they rile a majority of believers."[543] I would argue, however, that Datta's conclusions are based on a selective analysis of court cases, and suffers from severe misreading of the facts in cases that he cites as evidence for his conclusions. In the last chapter, I have shown how the courts in India have favoured proscription of the books claimed to be offensive to religious sentiments of different communities, and therefore Datta is not completely right in making such broad claim about the courts' behaviour, arguing that Penguin was assured of a legal victory, if they would have continued the legal battle. Even if one could agree that the criminal charges could not stand in the court of law as it would have been difficult for the counsel of the plaintiff to show "deliberate and malicious intentions" of the author/publisher, nevertheless the civil suit could still go against them.[544] Further, as discussed earlier in this chapter, given the fact that the

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[541] Saurav Datta, "How Wendy Doniger and her publisher can rescue *On Hinduism*," *DNA*, March 4, 2014.

[542] See for example, Aarti Sethi and Shuddhabrata Sengupta, "Towards a Readers' Uprising: Reflections in the wake of Assaults on Books and Authors in Today's India," *India Review* 13, no. 3 (2014), 290-299; Pallavi Polanki, "Censorship by other means, Dinanath Batra shows the way," www.firstpost.com/india/censorship-by-other-means-dinanath-batra-shows-the-way-1560243.html.

[543] Saurav Datta, "Wendy Doniger and her publisher."

[544] This point about criminal charges was also discussed by A.G. Noorani. See, A.G. Noorani, "Penguin and the Parivar."

courts have been inconsistent in terms of doctrines used to decide each case, it is quite difficult to predict, whether or not the courts would have upheld the criminal charges.

Coming back to the arguments of legal commentators like Venkatesan and Noorani, though it is difficult to comment whether Penguin was misled by its legal advisors, it is clear that its concern were more than just concerning whether the court would uphold the criminal charges levelled against the author and the company. This is evident from the statements released by Doniger and Penguin India Ltd. in response to the criticism they faced after the settlement agreement. It was maintained in both the responses that the uncertainty over the interpretation of section 295(A) was one of the primary reasons for their out-of-court settlement with Batra. Doniger called the statutory laws "the true villain" in the case, as it threatened to "jeopardize the physical safety of any publisher, no matter how ludicrous the accusation brought against a book."[545] The company feared that "the Indian Penal Code, and in particular section 295(A) of that code, will make it increasingly difficult for any Indian publisher to uphold international standards of free expression without deliberately placing itself outside the law."[546] The concern was not only with the vague and broad language used in such law but also the ambiguity over its probable interpretations in the courts. Doniger and her publisher, Penguin, were equally worried about the ambiguity of the legal process. Doniger argues that in the Indian context "if you got the wrong judge…. you'd be convicted just for publishing a statement that you had good reason to believe might well offend someone."[547] Penguin, on its part pointed that it was obligated to respect the law of the land, "however intolerant and restrictive those laws may be", but at the same time, it was also committed to protect its employees from threat and harassment.[548] Therefore, it held

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[545] See, Wendy Doniger's statement released by PEN India, available at www.outlookindia.com/ article/i-do-not-blame-penguin-books-india/289473.

[546] See, "Penguin India's Statement on *The Hindus* by Wendy Doniger," http://www.penguinbooks india.com/ en/content/penguin-india%E2%80%99S-statement-%E2%80%98-hindus%E2%80%99-wendy-doniger.

[547] See, Wendy Doniger, "India: Censorship by the Batra Brigade," *New York Review of Books*, May 8, 2014, www.nybooks.com/articles/archieves/2014/may/08/india-censorship-batra-brigade/.

[548] The letter made public by Penguin India as present in "Penguin India's statement on *The Hindus* by Wendy Doniger."

that its decision to settle the matter after four years of legal battle was justified. Although the act was seen by many legal commentators like Noorani, Venkatesan, and Datta, among others, as surrender to the radical forces, the reasons forwarded by the company indicate at the insecurities that the author/publisher faced in the absence of robust institutional structures for the protection of their freedom of speech and expression.[549]

Doniger's was not an isolated incident where legal notices from groups claiming hurt sentiment had forced significant changes in the attitude of the publishers. For example, in September 2008, while a case was filed in the Delhi High Court to order the removal of A. K. Ramanujan's essay from the History syllabus being taught at undergraduate level, the SBAS also served a legal notice to Oxford University Press (OUP), India, the original publisher of the essay in an edited volume, asking them to stop printing the essay.[550] The OUP not only apologised for the fact that the essay had hurt religious sentiments of Hindus, but also gave assurance that the essay was no more in print, nor did the publishers have any intentions of reprinting it.[551] Also, in the case of James Laine's book, *Shivaji: Hindu King in Islamic India*, even before the case reached the court, the publishing house had promised to stop printing and withdraw the publication from the market due to the fear of legal action against it.[552] Similarly, as discussed earlier in the chapter, in the case of D. N. Jha's book *Holy Cow: Beef in Indian Dietary*

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549 See, Pratap Bhanu Mehta, "Silencing of Liberal India," *Indian Express*, February 12, 2014. This concern was also reflected by commentators like Pratap Bhanu Mehta and Shivprasad Swaminathan. Mehta held that the courts have consistently failed to protect liberal values like freedom of speech and expression and therefore it has led to the silencing of "liberal India." Also see, Shivprasad Swaminathan, "Scribblers, Scholars in the same boat," *Hindu*, February 25, 2014. Swaminathan on a similar line showed that if the potential benefits are pitted against the hazards, the authors and the publishers ought to prefer some form of censorship in order to protect themselves from the distress surrounding legal actions.

550 Paula Richman, *Many Ramayanas: The Diversity of a Narrative Tradition in South Asia* (Berkeley and Los Angeles: University of California Press, 1991). SBAS served a legal notice to Oxford University Press regarding this book.

551 Also in the Supreme Court the advocate of the publisher assured the court about this in 2010. Also see, "When a Department let the University Down," *Hindu*, November 3, 2011.

552 The book of James Laine, Shivaji: Hindu King in Islamic India was banned in Maharashtra after some Hindu groups from Maharashtra protested against the same. But later the Supreme Court lifted the ban. See, *Sanghraj Damodar Rupawate*, Civil Appeal of 2010 (Arising out of S.L.P. (C) No. 8931 of 2007).

Tradition, the publisher – CB Publishers, refused to publish the book, due to fear of further prosecution or controversy, even after the civil court in Hyderabad lifted its stay on the publishing of the book.[553] The concern guiding each such publisher's decision to withdraw or pulp a book is almost same i.e. to protect themselves from entering the vortex of legal process which harms their interest both financially as well as in the form of intimidation through criminal charges against its employees.

It is evident from the above discussion that both law and legal process can act as hurdles in the free exercise of freedom of speech and expression by creating an environment of fear of retribution. This eventually encourages what Cook and Heilmann call "public self-censorship." Public self-censorship is a phenomenon where the censor and the censee are two different agents "and where the censee censors him or herself in response to this external censor."[554] Cook and Heilmann differentiate "public self-censorship" from "private self- censorship" based on the absence of an external censor in the later case; the censor and the censee therefore being the same agent. In the case of Doniger's book, it was explicitly a case of self-censorship, where the publisher decided to pulp the book, without any such direction from either governmental institutions or the judiciary. However in this case there were two sources of external censors. First of all, there was Dina Nath Batra who had been threatening by filing civil suits and levelling criminal charges against the author and the publisher; and second, the law and legal process played the role of another censor by creating an atmosphere of uncertainty and prolonged distress. As the external sources were not situated in any form of government order for ban or judiciary's pronouncement in the case, it cannot be seen as a classic case of censorship. The role of law and legal process as external sources for censorship in this case cannot be put into the same bracket of overt forms of censorship[555], as it had less to do with the stated position of law in the constitution or

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553 The author and the publisher faced several threats during the controversy. Jha's property was also vandalized by unknown assailants. For complete reporting of the events see, Sheela Reddy, "A Brahmin's Cow Tales."

554 Cook and Heilmann, "Two Types of Self-Censorship," 186-187.

555 Ibid., 180-183. Overt forms of censorship here refer to the censorship imposed by the state institutions directly. Normally laws limiting freedom of expression form part of the tools used by state to regulate speech acts. However, in cases as mentioned here laws do not act directly to restrict free speech.

statutory books or even the settled interpretation of the law by the judiciary, and much more to do with the ambiguity produced by the language of the law as well as the fluctuating position of the judiciary in such cases. In the above case, the decision to pulp the book by Penguin as the censee was a response to its interaction with the external sources of censorship. This phenomenon precisely reflects the pressures exerted by law and legal process in the struggle for freedom of speech and expression in Indian context.

5. Conclusion

In the present chapter I analysed the role that law and legal process play in the practice of censorship in the Indian context. I showcased the procedural and the functional aspects of the working of law that act as hurdles to the enjoyment of freedom of speech and expression. On the basis of a study of thirty two cases in the post-independence period I argued that the issues like spurious charging and overcharging, freedom to file a case anywhere in India, and the time taken by judiciary to deliver verdicts on cases together create conditions where the individual defending his/her freedom of expression faces distress and harassment. Further, the fact that the courts do not priortize free speech cases, and that the judicial precedents related to free speech cases are confusing and inconclusive, adds to the environment of helplessness and uncertainty. Through the example of Wendy Doniger's book *The Hindus*, I showed that the environment produced by the procedural and functional lacunae exhibited by the law and legal process work negatively against freedom of speech and expression by encouraging "public self-censorship." On the one hand, it encourages non-state censors like Dina Nath Batra to take the legal route to harass and force the author/publisher to submit to their demands of censorship; and on the other hand, the legal system discourages the author/publisher from expecting that the judiciary could rescue them from such situations. It is not to say that the judiciary has never given a positive decision favouring freedom of speech and expression. One can cite several cases like *Sujato Bhadra* or *Sanghraj Damodar Rupawate*, where the courts produced definitive judgments in favour of freedom of expression, but the long legal battle and the uncertainty attached to the outcome of the court case is exhaustive and disheartening. It is particularly true

about book publications as even if the court decides in favour of the author/publisher, it affects the financial prospects of the publication and also the relevance of the publication depreciates considering the amount of time taken to reach such judgments. The lack of institutional protection therefore increases the vulnerability of the authors/publishers to the pressures exerted by non-state actors claiming religious offense.

CHAPTER 6

ROLE OF NON-STATE ACTORS IN CENSORSHIP AND THE POSITION OF COURTS

1. Introduction

In the last two chapters, I discussed the attitude of the courts in India towards freedom of speech and expression in general, and particularly with regard to contentious publications claimed to be offensive to the religious sensibilities of some section of the population. I have argued that the courts have failed to provide a solid defence to freedom of speech and expression. In fact, the lacunae largely associated with the functioning of the courts and the ambiguities reflected in its judgments have proved counter-productive to the defenders of free speech. It has not only resulted in creating an atmosphere of uncertainty and fear among authors/publishers, but has also acted as a source of encouragement for people demanding censorship of publications, based on their claims of religious offense. The case of Wendy Donigers's *The Hindus* has been a striking example of this dichotomy. The institution of the judiciary, which was established by the constitution makers as the ultimate defender of civil and fundamental rights of the citizens – especially freedom of speech and expression – has allowed the curtailment of this important right in the garb of legal language and constitutional interpretations. Though some of the court judgments seem to favour freedom of speech and expression, the courts' general attitude of defining the limits of freedom of expression vis-à-vis public order or other values that it considered important for Indian society, have resulted in producing a public context which cannot be considered favourable for a free exercise of freedom of expression.

In this chapter, I examine cases related to censorship where the government, the judiciary, and non-state actors interact. The process, through which social forces collude with state power, often renders subordinate the role of the courts in the politics of censorship. To highlight this aspect I discuss two types of cases: a) cases where the

use of statutory laws like the Customs Act, renders an immunity to the decision of the government; and b) cases where the prevailing atmosphere forced the author to censor controversial writing, regardless of the fact that the court had found nothing objectionable in the text and hence revoked the official ban on the book. In each of these cases we see an active role played by non-state actors which include socio-religious groups as well as political parties. The main arena of the contestation between the claims of religious offence and freedom of expression remain, I argue, outside the courtroom. However, the language of law was predominantly used as a legitimizing source for demands of censorship.

I argue that though the claims for censorship are generated by the non-state actors, it is primarily the failure of state institutions that allows such demands to restrict freedom of speech and expression. In fact, non-state actors are able to manipulate the state institutions by exerting pressure through deliberations, mobilization or protest. The government appears to give in under such pressure, either in the name of protecting religious rights or under threat of nuisance produced by the public display of hurt sentiments. In its role of managing diverse claims, the government's functioning reflects a tilt towards the claimants of religious offense. This creates what one might describe as a "web of censorship," where an author/publisher finds him/herself locked and his/her claim for freedom of speech and expression remains unheard. This has been one of the main reasons for scholars of censorship in India to claim that all forms of intervention by non-state actors in the process of censorship is problematic and unwarranted in a democracy like India. I argue that we need to look into the interventions of non-state actors, by distinguishing their participation through the legal process, and their use of violence and threats, to impose censorship. This distinction helps us to understand that on many occasions, the grievances may be genuine, and that the expression of such grievances, even the protests to attract attention of government officials towards their grievances, may fall well within the democratic rights of citizens. However, any use of violence, or threats is not only illegal, as the courts have also maintained on various occasions, but also detrimental to the free exercise of freedom of speech and expression as a constitutional right. The courts, in such cases, are the sole authority, to determine the permissible limits to freedom of speech and expression, as

sanctioned under the constitution. This approach helps us to develop a more rational and sensitive approach, to view the role of non-state actors, in the process of censorship.

2. Trivializing the Role of the Court in the Politics of Censorship

The role of the court in censorship is significantly limited by the fact that there exist laws within the Indian legal system that protect the executive's decisions from judicial scrutiny. For example, the Customs Act[556] is one of the notable laws used by the government to prevent the import of any publication that it holds may create problems in the country or may be in the bad taste to the government. Historically, the law has been used to stop the import of propaganda material and political manuscripts, but also publications on religion which according to the government had the potential to create unrest among any section of the population.[557] In many such cases, government's act goes unnoticed as it does not become part of the popular discourse nor does the news get appropriate mediation. As early as in 1956, Nehru's government decided to ban the import of Aubrey Menen's *Rama Retold*, which was believed to contain material that could hurt the sentiments of the Hindus in the country.[558] The use of the Customs Act to prevent entry of any publication in the territory of India reflects a paternal attitude on behalf of the state where it decides for its citizens which material is readable and which ones could instigate sharp reactions. One of the significant cases of censorship where the Customs Act played a role was in the ban of Salman Rushdie's *Satanic Verses*. This example clearly highlights the phenomenon whereby the public debate over the issue

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[556] Section 11 of the Customs Act, allows for prohibition of import of any material, including publications, for maintenance of public order, standard of decency and morality, and also for any other purpose conducive to interest of public order.

[557] Books whose import to India was banned under the law included *Pakistan-Pasmazarwa Pashmanza* (1950); *Cease Fire* (1950); *What has Religion done for Mankind* (1954); *Captive Kashmir* (1958); *The Heart of India* (1959); *Nine hours to Rama* (1962), among others. Some of these were held to be demeaning to the image of India, and others considered material for political propaganda. The list of books to be banned from import owing to its commentary on religion included the likes of *Marka-e-Somnath* by Maulana Muhammad Sadiq Husain and Sadiq Siddiqui (1952), *Ayesha* by Kurt Frischler (1963), and *Early Islam* by Desmond Stewart (1975), among others.

[558] Aubrey Menen's *Rama Retold* was one of the earliest books to be banned in independent India in 1955 on this ground. Menen's was a satirical work and dealt with the characters of Ramayana in a very different way than as in the popular discourse.

interpreted variously the scope of censorship laws in India including its validity, but all this happened outside the purview of the court. The banning of *The Satanic Verses* raised several moral and normative questions, about religious offense and freedom of expression, which became subject of intense debates within political theory. However, here I am primarily concerned about the debates on the subject of law in this episode, and the role played by the non-state actors.

2.1. Banning of *The Satanic Verses* and the Public Debate over Law

Much before the formal launch of the book, *The Satanic Verses*, there were apprehensions about the probable impact the book could have on Indian readers. Khushwant Singh[559] advised the publishers of the book, Viking Penguin, not to publish the book in India as he feared that the comments and the content of the novel, especially satirical references to the Prophet and his wives would not be received in good spirit by the country's Muslim audience. Before the launch of the book, an interview by the author, along with some extracts from the book were published in two popular journals.[560]

Syed Sahabuddin, the Member of Parliament (MP) from the Janata Party, along with other prominent Muslim representatives like Khurshid Alam Khan[561] brought the interviews of Rushdie and the extracts published in *India Today* to the notice of the government.[562] They feared that the book might create communal disturbances in the country and therefore requested that the book be banned. The Rajiv Gandhi government felt that the concerns were reasonable and hence the ban order was passed on 5th

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559 Singh was a well known literary figure of India. The publishers of The Satanic Verses, Penguin, approached him for comments on the book six months before its formal release.

560 The interview with Madhu Jain was published as, "My theme is fanaticism," *India Today*, September 15, 1988; Interview with Sharbani Basu was published as, "Of Satan, Archangels and Prophets," *Sunday*, September 18-24, 1988.

561 Khurshid Alam Khan was a minister in Rajiv Gandhi government and a prominent Muslim leader of Indian National Congress.

562 "The Day After," *Sunday*, November 6-12, 1988. Khurshid Alam Khan was a prominent Cabinet minister in Rajiv Gandhi government during this period.

October under section 11 of the Customs Act, which prevented any import of the book into India.[563]

The call for a ban incited a controversy as it was argued that the government had succumbed to the demands of Muslim politicians, showing disregard for the freedom of expression, and misuse of the legal provisions. Some legal luminaries argued that the Custom's Act did not contain any provision to ban a book on the basis of religious insults. For instance, Soli Sorabjee remarked that the law "curiously does not impose any ban on books which insult religion or offend religious sentiment of the people, as have been erroneously assumed in some quarters."[564] However, the official statement by the government maintained that the ban under section 11 of the Customs Act (1962) was a "pre-emptive step" to avoid "misrepresentation" of passages of the *Satanic Verses* for "political purposes," which it feared – could lead to public order problem.[565] It further held that the order did "not detract or otherwise reflect on the artistic or literary worth of the book or its author."[566] The government presented it as a judgment based on public order concerns, rather than the merits or contents of the book. Although a ban under the Customs Act was immune from any challenge in the judiciary, the decision could be justified in the public realm as pragmatic and necessary and well within the constitutional limits set for freedom of expression under article 19(2).[567]

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563 "Book banning, Philistinism and Freedom of Expression," *Frontline*, October, 15-28, 1988. Interestingly, *Satanic Verses* was released on 26th September, 1988 in the UK, and advance copies had reached India soon afterwards. However, Government's notification only prevented the importation of the copies of the book to India and did not say anything about the copies that had already reached Indian territories. So, even today, possession or reading of the novel in India is not legally banned.

564 Soli J. Sorabjee, "Ban on Rushdie's Book: A Pernicious Precedent," *Indian Express*, October 14, 1988.

565 Official statement as presented in, "Book banning," *Frontline*, October, 15-28, 1988. The Custom's Act did allow for prohibition of import for maintenance of public order, standard of decency and morality, and also for any other purpose conducive to interest of public order. See, section 11 of Customs Act (1962).

566 Ibid.

567 This argument was also forwarded by Buta Singh, the Minister of Home Affairs, when while answering one of the queries on the subject in the Rajya Sabha he justified the ban by arguing that "the contents of the title were likely to be detrimental to the maintenance of public order." Though legislator B. Satyanarayan Reddy had also asked about the objectionable material found in the book, the Minister chose to evade the question. See, *Rajya Sabha Debates*, November 3, 1988, 41-42.

The decision to ban the book initiated a public debate about the state of freedom of speech and expression in India. On the one side were those who raised issues about the intentions of the government. In particular, they pointed to the tendency of the government to succumb to pressure from some Muslim leaders.[568] On the contrary, the supporters of the ban invoked both moral as well as legal aspects of the case. They applauded the role of the government in the whole episode, and lauded it for protecting the constitutional spirit of secularism and multiculturalism.[569] The support for the ban was broadly based on three sets of arguments. The first argument was that vilification of religious personalities, contained in the book, could hurt religious sensibilities. Sahabuddin argued that insulting the respected figures of Islam could not be a part of satire, and any act of casting aspersions on such pious symbols could not be tolerated. He commented, "You depict the holy Prophet…as an imposter and you expect us to clap for you. You have the diseased mind and the evil pen to situate the wives of the holy Prophet… the mothers of the community, in a brothel and you expect the Muslims to prove your power of imagination."[570]

The second argument was that the book could ignite religious sensibilities, and could lead to rioting and communal disturbances. This was contrary to Rushdie's comments during the early phase of the controversy that "no book can cause riots."[571] This claim was effectively rebutted by Khushwant Singh who remarked that Rushdie was "naïve" to think that way, as Indian history was full of cases where hurt sentiments had led to

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[568] Rushdie wrote an open letter to Rajiv Gandhi in this regard, which appeared in several news `dailies. See Lisa Appignanesi and Sara Maitland, ed., *The Rushdie File* (London: Fourth Estate, 1989), 42-45. He believed that the step of the government was senseless as his work about a secular person's view on the ideas of religion and revelation. See, "A Senseless step, says Rushdie," *Times of India*, October 8, 1988.

[569] Shahbuddin said, "If to seek redress of a religious grievance from the government which is the custodian of the dignity of all our people is fundamentalism in your lexicon, so be it." See, "You did this with Satanic Forethought, Mr. Rushdie," *Times of India*, October 13, 1988. He applauded the responsiveness of the government and claimed that it signified that the government was not "insensitive to the religious sentiments of the people." See, "Ban Welcomed," *Times of India*, October 9, 1988.

[570] Syed Sahabuddin, "No, Mr. Rushdie, You Acted with Satanic Forethought," *Muslim India*, November, 1988.

[571] As quoted in, "A Senseless step, says Rushdie," *The Times of India*, October 8, 1988.

communal mobilization culminating into violence and riots.[572] The third argument was about violations of Indian laws. It was argued that the demand for the ban, as well as the government's decision, was not based on abstract principles or force; rather it had firm support from within the legal structure of the country and was therefore justified. Salman Khurshid, a prominent Congress leader and also a lawyer, charged Rushdie of defying "Indian laws relating to obscenity and religious practice."[573] The laws within IPC were quoted along with the Customs Act to convey the point that if Rushdie had been present in India, he could even be convicted under sections 295(A) and 153(A).[574] So, overall the book was found objectionable by those supporting the ban of the book on three grounds: it was considered to be "a crime against human decency"; "an insult to Islam"; and "an offence under Indian law."[575]

The case of the ban on Rushdie's *The Satanic Verses* in the Indian context became infamous for several reasons. The demand for the ban was raised by influential Muslim legislators and ministers, like Shahbuddin and Khurshid Alam Khan, and the government was accused of responding to such demands simply to distract public attention, as well as to regain the confidence of India's Muslim population that it had lost due to its position in the Ayodhya case.[576] As a result, it was claimed by those who opposed the ban that the decision of the government was arbitrary and lacked cogent justification for imposing the

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572 "A Riot has been averted: Khuswant Singh," *The Times of India*, October 30, 1988. Reports suggested that such fears were not completely unfounded. After Khomeini's *fatwa* riots broke out in parts of Western India, and 12 people were reported dead in police firings in Mumbai. Similar riots were also reported from Kashmir. It was indicative of the possible situation if the book was not proscribed. See, "Freedom of Information and Expression in India," *Article 19*, October 1990, republished in the *PUCL Bulletin of April 1991*. Also see, "Uneasy calm in Riot hit Areas," *Times of India*, February 26, 1989.

573 As quoted in Kumar, *The Book on Trial*, 202. Similarly, Shahbuddin maintained that indecent remarks about "the Prophet's wife violated the Indian Penal Code, which prohibited any writing that hurt the religious sentiments of the people and were in bad taste." Here Khurshid and Shahbuddin were referring to the laws within IPC like Section 295(A), and 153(A). "Ban Welcomed," *Times of India*, October 9, 1988.

574 "Ban Welcomed," *Times of India*, October 9, 1988.

575 "You did this with Satanic Forethought, Mr. Rushdie," *Times of India*, October 13, 1988.

576 Ayodhya is the place in Uttar Pradesh where it is claimed that Rama, the Hindu deity was born. At the site of his birth, it was claimed that Babar, the Moghul king had forcefully constructed a mosque after destroying an age old temple. The Union government of Rajeev Gandhi had decided to open the doors of the deserted part of the temple so that prayers could be offered by Hindus. It created an atmosphere of tension, that culminated in the destruction of the Babri Mosque by Hindu groups in 1992.

Customs Act.[577] Though it was not the first time that a book was banned in India, or its import prevented by the government, the case of Rushdie attracted international attention owing to polarized reactions on the subject world over. This included a fatwa by a Muslim cleric in Iran for beheading Rushdie, and the explicit position of governments in countries like Britain on not banning the book despite pressure from Muslim communities.[578] In all of this, the position of the Indian government was severely criticized. The Indian government, on the contrary, justified the legality of its action based on the available statutory laws.

Two aspects of the Rushdie episode are significant for my study. On the one hand, it exposed the limits of the courts when laws like Customs Act are invoked by the government. Though the claim that the book violated the law was used as an important excuse by those protesting against the book, its validity could not in fact be tested, since the case could not be pitched in the courts. Secondly, it had shown that the government could be forced to order a ban on publications in the name of hurt sentiments, and the fear of threats to public order. This aspect was crucial to examine the role of non-state actors in censorship. The opposition created between freedom of expression, and protecting the interest of a religious community, in the name of the state's role in a multicultural society, persisted after the ban on *The Satanic Verses*. In fact, in certain cases the binary became more acute, with a more direct role for non-state actors like socio-religious groups (including political parties) demanding censorship on the pretext of protecting the sentiments of a community from hurt.[579] In all of these cases, the role of the courts as protector of free speech was severely undermined. This phenomenon was also visible when Taslima Nasreen, the Bangladeshi author, who was physically attacked, and after being placed under pressure from socio-religious groups, agreed to delete controversial portions

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[577] It was reported in several foreign newspaper of the time. For example, The Independent, under the title, "Rushdie novel banned in India" on October 6, 1988 reported: "The Indian government, bowing to pressure from Muslim groups, yesterday banned Salman Rushdie's latest book." A letter signed by 21 prominent arbiters led by Dom Moraes and Adil Jussawala, was sent to the Prime Minister of India, Rajiv Gandhi, on October 20, 1988.

[578] The details of the case and the reactions world over have been extensively discussed in Appignanesi and Maitland, ed., *The Rushdie File*; Daniel Pipes, *The Rushdie Affair: The Novel, The Ayatollah, and the West* (N. Delhi: Voice of India, 1998).

[579] These included cases like the demand to not publish Ambedkar's *Riddle in Hinduism* in the Collected volume published by Maharashtra government in 1989 by Shiv Sena, among others.

from her novel *Dwikhandito*, regardless of the fact that the High Court had found nothing objectionable in those parts. The case of censorship in *Dwikhandito* not only uncovers the complexity of the censorship debate in the Indian context but also shows how censorship has often become a tool for instrumental politics among the stakeholders.

2.2. The Muslim Groups and Nasreen's Submission

In August 2007, during the release of the Telugu translation of her novel *Shodh*, Nasreen was physically attacked by a group led by three legislators of the Majlis-e-Ittehadul Muslimeen (MIM). The attackers justified their act by arguing that she could not be allowed in Hyderabad, because of her objectionable writings against Islam and the Prophet.[580] The immediate reason given for the attack was provided by her articles in *Outlook* magazine in January 2007, where she had criticized Muslim society for imposing a restrictive way of life on women, especially by insisting on *purdah*, and also the Quran, for enjoining such impositions. With the publication of her article, Nasreen faced opposition including threats to her life. The issue caught the attention of Muslim organizations all over India. Following this, Muslim organizations in Kolkata organized a protest against her visa extension. There was a general feeling that her attack on Islam and on religious symbols had demeaned Muslims. The protests culminated into city-wide rioting on 21 November, 2007.[581] Responding to the situation, the government

[580] However, some commentators believed that it was a planned strategy of MIM for publicity. It was argued that MIM was losing its Muslim base in Hyderabad because of the left's increasing popularity in the Muslim pockets of the city. Hence its legislators felt the need to rekindle its image as the authentic protector of Muslim rights. Saba Naqvi, "No Orchids for Miss Nasreen," *Outlook*, August 27, 2007.

[581] The immediate reasons for the protest and attacks were different. In this background appeared an unsigned article in the CPI(M) backed journal *Pathasanket* which endorsed Nasreen's views on Islam and the Quran. The article argued that Nasreen's hitting out at fundamentalists from a rational and scientific point of view could not be treated as an offence. It further compared her with Galileo and even made a vitriolic attack on the Prophet over his marital life. The article shocked the Muslim community and was construed as an attack on Islam. The Muslim groups, especially the AIMF led by Idris Ali took strong exception to it. AIMF demanded a ban on the magazine and seizure of all copies in the market. The Muslim organizations also demanded that Nasreen's visa be revoked and that she should be sent out from India as she had time and again created communal tensions here. The state government promptly banned the autumn issue of the magazine, but the decision over her visa did not fall under its jurisdiction. However, by this time, violence had erupted again in Nandigram where, it was alleged, the CPI (M) cadres had opened fire killing around 30 villagers. Prominent anti-left Muslim organizations including AIMF, Jamiat Ullema-e-Hind and Furfura Sharif Muzadeedia Ananth Foundation came together to protest against violence in Nandigram and unethical refuge to Taslima Nasreen in order to expose the government on 21 November 2007. The protests turned violent and soon took the shape of riots. The army was called in to manage public order situation. See, "Left Magazine's Autumn number banned," *Times of India*, November 9, 2007.

planned her secret escape to Rajasthan, and from there she was later shifted to Delhi where she stayed in a safe house for 110 days before leaving for Sweden.[582]

In the context of charged Muslim sentiments, no political party was in a position to explicitly support Nasreen. It was the ruling Left Front government of West Bengal that decided to deport Nasreen, and the Congress-led Central government that provided logistics for the same. The state government defended its action by maintaining that they respected individual freedom and rights "but it does not mean a person can hurt the sentiments… and abuse religion."[583] Jyoti Basu, the top leader of the ruling CPI(M) commented, "No Muslim will stand the way she criticized the Quran and the Prophet. That is why we banned her book *Dwikhandito*."[584] A statement was issued in the Parliament on November 28, 2007, by the Minister of External Affairs, Pranab Mukherjee, who made it clear that though the government would continue to provide shelter to Ms. Nasreen, it was expected that the "guests will refrain from activities and expressions that may hurt the sentiments of our people."[585]

Consequently, Nasreen asked her publishers to withdraw the controversial parts from *Dwikhandito*. She issued a note that said:

> I have withdrawn some parts of my book *Dwikhandito*. Some said parts of the book were hurting the sentiments of the people. I hope after its withdrawal, there would be no more controversies… The decision to

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582 Though there were obvious links between the attacks in Hyderabad and her deportation from Kolkata, owing to the similarity of the issues raised and nature of opposition, but the immediate reasons that forced the government to act was different. It was a period of intense political instability in West Bengal owing to violence at Nandigram and Singur where land acquisition by the government for industrial expansion was being opposed by villagers. The government took a strong stand and the opposition witnessed extremes of police brutality. Nandigram was a Muslim majority area and it took no time for the violence there to develop a communal logic. The government was further cornered after the controversy generated by the case of Rizwanur Rehman who was allegedly murdered for marrying a Hindu girl belonging to a reputed trading family. His death saw a heavy backlash from Muslims in Kolkata and a difficult law and order situation developed in late September. Such incidents had alienated the Muslims and the West Bengal government was already on the defensive. See, "Exiled to the vote Bank," *India Today*, November 30, 2007.

583 Minister Abdus Suttar, as quoted in *Times of India* (December 29, 2007).

584 "Basu: Taslima welcome to Kolkata," *Times of India*, December 21, 2007.

585 The statement was made in both houses of Parliament.

> withdraw these parts from *Dwikhandito* is to prove that I never wanted to hurt the people's sentiments.[586]

This decision was seen as an apology and welcomed by different parties, including non-state actors, which were involved in the controversy.[587] Siddiqullah Chaudhary, general secretary of the Jamiat Ullema-e-Hind, one of the prominent Muslim organizations involved in the controversy, said: "This is a good step and we are happy that good sense has prevailed. If she had taken this step before, then a lot of conflict could have been avoided."[588] Even Jyoti Basu issued a statement expressing that she could return to Kolkata.[589] The act of deletion was seen as a setback to the struggle for freedom of expression by authors, journalists, and other members of the civil society, who only few days earlier had organized a massive rally in Kolkata in her support.[590]

2.2.1. *The Curious Case of Dwikhandito and the Role of Courts*

Nasreen's decision to delete controversial portions from her book was seen as forced censorship, given the surrounding political circumstances. Yet, the tokenism of Nasreen's submission, expressed by the act of removing sections from the controversial book to render an apology, and the acceptance of all the stakeholders of it as such, undermined the role of the courts as agents of censorship. To understand the paradox involved we need to look at the history of the controversy, particularly after the publication of *Dwikhandito*.

The book was the third volume of Nasreen's autobiographical series, and discussed the author's multiple sexual relationships with some of the most prominent authors and poets both in Bangladesh and India during her youth. It first came to public scrutiny

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586 "Taslima removes controversial lines from Book," *Hindustan Times*, November 30, 2007.

587 This included Muslim organizations such as AIMF, Jamiat Ullema-e-Hind and Furfura Sharif Muzadeedia Ananth Foundation, and political parties like AIMIM, Congress Party, and CPI (M).

588 "Taslima withdraws controversial lines from Dwikhandito," *Financial Express*, December 1, 2007.

589 "Taslima can return to Kolkata, says Basu," *Hindu*, December 26, 2007.

590 "Taslima's surrender on 'Dwikhandito' a great setback: Intellectuals," *DNA*, December 9, 2007.

when the West Bengal High Court passed an injunction on the publication, sale, marketing and circulation of the book after a defamatory suit was filed by Syed Hasmat Jalal, one of the figures with whom Nasreen had claimed sexual relations in the book. The government of West Bengal banned the book only a week after this injunction order. Some Muslim organizations like Jamiat Ullema-e-Hind and All India Minority Forum (AIMF) had complained about the book: in particular, they held, certain passages contained insults against the Prophet Muhammad and Islam.[591] Justifying the ban, the Chief Minister of West Bengal, Budhadeb Bhattacharjee said, "I've read the book, not once but several times. I've discussed the contents with 25 people who matter and have finally decided to proscribe it."[592] The government argued that if the book were not banned, "it could ignite communal tension."[593]

As in Rushdie's case, there was fierce opposition to the government's decision by those who believed that the government had submitted to the demands of extremists. Some critics believed that the reaction of the government was not based so much on the fear of communal violence but on her reference to sexual relationships with prominent personalities of Bengal who, as it happened, were also close to the Left Front government leaders of Bengal.[594] Taslima Nasreen expressed shock on the ban order. She argued that there was nothing "in the relevant pages of the book that might cause riots." "Also", she pointedly asked, "is it correct to underestimate Muslims so much? Are Muslims so ignorant, illiterate, intolerant, and convertible when faced with any kind of criticism about their religion?"[595] However, the government had decided to ban the book, and the decision was actively supported by other major political parties. They

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591 Nasreen used terms like "ruthless murderer," "rapist," and "scoundrel," for Prophet, and criticized Islam for its treatment of women as slaves.

592 "Bengal Bans Taslima's Book," *Statesman*, November 29, 2003.

593 Ibid. The position was reiterated in the Party organ of CPI(M), *People's Democracy* on November 7, 2003 (Vol. XXVII, No. 49). It said: "The Bengal left front government has decided to ban Bangladeshi author Taslima Nasreen's latest book, Dwikhandito because it was feared that the book would incite communal violence."

594 Ghosh, "Censorship," 447-454.

595 As quoted in an interview published in *Frontline* (January 31, 2004).

believed that the book contained perversions of the teachings of the Quran and hence would give sustenance to anti Islamic views. Further, it was claimed that the adjectives used for the Prophet were not in good taste.[596]

Human rights activist from Kolkata, Sujato Bhadra, appealed against the ban in the West Bengal High Court. After almost two years the court lifted the ban from the book on September 22, 2005. The Court's observations were crucial. The court believed that the intention of the author, "who herself profess the same religion has to be gathered from the context of the book."[597] It held that though the book contained harsh language against the Prophet, there was no deliberate and malicious intent on the part of the author of *Dwikhandito* to outrage the religious feelings of any class of citizens of India based on the fact that "the insult to religion was not the central theme of the book, read as a whole." Further, it argued that if the insult to religion is in good faith in "his/her endeavour or object to facilitate some measure of social reform by administering such a shock to the followers of the religion, as would ensure notice being taken by any criticism so made would not attract the mischief of section 295(A)." The court also held that the author was dealing with the specific situation in Bangladesh "which was a theocracy and not India, which is a secular country." Though the court came to the defence of Nasreen's freedom of expression, one might see it as a case of "overindulgence" with the text. For example, the court overlooked the insulting references to the Prophet because it believed that the subject of the book itself was not based on it. Further, the emphasis laid on the context rather than content was questionable, as it did not say anything about the possible fate of the text, if the narrative was based in the Indian context. The observation by the court that the author was dealing with a situation specific to Bangladesh, "which was a theocracy and not India, which is a secular country", gives an impression that the court would have dealt with the book differently if it discussed about similar situation in India. The judgment of the court was largely prescriptive. In absence of a principled position, as discussed in earlier chapters, it remained open to interpretation in other cases. The stress

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596 Ansari, "Free Speech-Hate Speech," 15-19.

597 *Sujato Bhadra*, 39 A.I.R. 239. Unless mentioned, all the references related to the case remains to be the same.

placed upon the context also seemed to imply that the court did not believe that freedom of expression could be an absolute right. However, once the court had decided in favour of Nasreen, by rejecting the ban on the book and holding that there was nothing objectionable contained in it, the legality of her book was established beyond doubt. The state government also did not pursue the case further by either filing a review petition or pleading at the higher court.

The events leading to Nasreen's decision to herself delete controversial sections raise some important aspects of censorship. The incidents at Hyderabad and Kolkata in 2007 which themselves qualified as crimes, produced a context where the legality of a book, even when pronounced by the court was, of no rescue to the author. The sentiment of hurt made visible in the streets of Kolkata was silenced with an act of self-censorship, where the court had no authority to sit on judgment.

This was not an isolated case in the history of censorship in India - where the court in its legal submissions found nothing wrong with a book, but the social pressures forced the author to censor his/her writing. Another notable case was the withdrawal of *Agnipariksha* (The test on fire) from public circulation by its author Acharya Tulsi, a Jain monk, in 1970. In September 1970, Acharya Tulsi, a very respected and popular Jain preacher, reached Raipur[598] to stay at the Anuvrat Ashram[599] during the holy period of "chaturmasa."[600] During one of the sessions of a discourse on 16 September, he referred to his work *Agnipariksha* which was recently published and was based on Jain version of Ramayana. He was particularly referring to some episodes where the character of Sita[601] was questioned. This caught the attention of some orthodox Hindus, who claimed that such references had offended their religious sensibilities: they demanded apology from the spiritual leader. The confrontation rapidly escalated and there were demands for

[598] Raipur formed a part of the state of Madhya Pradesh, but after state reorganization in the year 2000, it became the capital of the newly formed state of Chhattisgarh.

[599] Started by Acharya Tulsi under the *Anuvrat* movement.

[600] *Chaturmasa* is a holy period of four months in the Jain tradition dedicated to simple living.

[601] The wife of Rama according to revered Hindu mythology Ramayana.

banning the acharya's book and for his exit from Raipur. Orthodox Hindus argued that certain couplets were vulgar and profane and were designed to cast aspersions on Sita's character. The following months saw a massive campaign against the acharya, led by the Sanatan Dharma Sabha, a prominent Hindu organization in the area. The Sabha observed an "anti-acharya week" from 19 September during which massive protest demonstrations were organized, *hartals* (strike) and *bandhs* (closure) were held. Effigies of the Jain leaders and copies of the book were also burnt in Raipur.[602] Though the state government tried to control the situation, the protesters defied the prohibitory orders and violated section 144[603] that was imposed in the city. There were also reports that some workers sat on fast demanding ban of the book.[604]

The acharya promised an unconditional apology if anyone could show the mistakes in what he had said. He also maintained that the book did not contain any vilification as claimed by the protestors, but only an interpretation of the story as present in Jain tradition. He even offered to leave Raipur, if that could restore peace. Under pressure from the protestors and in view of the fact that law and order situation was continuously deteriorating, with reports coming in of demonstrations taking violent form at several instances, the state government issued notification for banning of the book and forfeiture of all the copies available under section 99(A). The protestors had succeeded in preventing the circulation of the book in Madhya Pradesh.

The publisher of the book and the sponsor approached the court against the forfeiture and ban orders of the state government. The full bench of the Madhya Pradesh High Court heard the case and delivered its judgment on December 24, 1970. The court set aside the impugned order arguing that the grounds on which the state government based the order of forfeiture did not exist. The Advocate General representing the case initially argued that the couplets used in the book were objectionable as it hurt the sentiments of Sanatan Hindus. The applicants on the other hand argued that the order

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602 "Anuvrat Leader to Quit RaIpur after Furore over Book," *Times of India*, September 29, 1970.

603 A section under IPC which when evoked makes assemblies and gatherings unlawful.

604 "Anuvrat Leader to Quit Rampur after Furore over Book," *Times of India*, September 29, 1970.

contradicted their fundamental right to freedom of expression and freedom of religion as guaranteed under article 19(1)(a) and article 25 of the Constitution.

The court maintained that state had every right to interfere with fundamental rights, as both – freedom of expression and freedom of religion – were conditional to public order.[605] However after a close reading of the controversial couplets, the court concluded that it could not find anything "grossly offensive or provocative matter," nor did the court "visualize any deliberate and malicious intention on the part of the author to outrage the religious feelings of Sanathani Hindus." Both these basic requirements to charge a work under section 295(A) were judged to be absent. Delivering the judgment Justice Tare noted:

> People may have their own views and it cannot be denied that there have been different versions of Ramayana through the ages which have been prevailing at least for more than 2500 years and it may be that different people might give a version which might serve their purpose. But a propagandist version, which does not come within mischief of the law, can in no case be considered to be objectionable.[606]

The court, therefore, came to the rescue of the book against the order of the state government. The comments of the court on the freedom of expression and freedom of religion were truly significant. The court held that such rights were subject to government's understanding of the situation at practical level. Hence though the order of forfeiture was set aside, the right of the state government to act in the way it did was upheld. Yet, even after the forfeiture notification was quashed by the High Court, the author decided to withdraw the book from public circulation, as it had initiated conflict among different groups which was not his motive in writing the text.[607]

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605 Justice Singh, in *Ramlal Puri*, AIR 1971 MP 252.

606 Justice Tare, in *Ramlal Puri,* AIR 1971 MP 252.

607 "Order on Muni's Book set aside," *Times of India*, December 25, 1970. The author later claimed that as a monk his primary commitment was to the ideals of non-violence and therefore he withdrew the book from circulation even after the Madhya Pradesh court had ruled in his favour. For reference see the book co-authored by Anuvrat Anushasta Tulsi and Acharya Mahaprajna, titled *Non-violence and World Peace* (Ladnun: Jain Visva Bharti), http://www.jainworld.com/book/nvoilence/primarylessons.asp.

The act of censorship in the cases of Nasreen and Acharya Tulsi cannot be best captured through its conventional lens of understanding. There is no doubt that the government was involved in banning the texts, but it is equally true that the courts came to the rescue of the author/publisher. So the decision either to remove controversial passages of the book or the text from public circulation does not qualify as a fit case of state censorship. It also does not fall into the category of what modern theories of censorship have called "new censorship" – a concept derived from the writings of Foucault and Bourdieu.[608] The category of "new censorship" equates the phenomenon of state censorship with all other forms of censorships like that of market.[609] Consequently, the analytical rigour of the concept of censorship is diluted, as it becomes extremely difficult to locate the agency of the censor in such acts of censorship. But in the above mentioned cases, the censors can be identified clearly. The decision of the authors remains primary in both the cases. So, it can be seen as a case for self-censorship. But it is important to view such self-censorship as a consequence of interrelated events rather than arising from the independent judgment of the authors. In the cases of Nasreen and Acharya Tulsi, the pressures exerted by different non-state actors including political parties, created an atmosphere where the act of censorship occurred. The dominance of a particular discourse defined what could or could not be allowed in the public sphere. This type of censorship is closely related to the category of "public self-censorship" discussed in Chapter 5, where the censee decides to censor him/herself but the main agent enforcing the decision stays outside the agent.

In the cases of Nasreen and Acharya Tulsi, the interplay between the state and non-state actors is also clearly visible. The interventions by the non-state actors compelled the state agency to respond, and as a result the author seems to be caught in a web of censorship which tests their potential to fight back. In such cases, the courts are the only institutions to which the author/publisher can turn for respite. However, if the authority and the views of the courts are undermined in strategic ways, as occurred in these two cases due to fear of social forces, in practice the scope of freedom of speech and

608 Post, introduction of *Censorship and Silencing*, 1.

609 Ibid., 4.

expression is thereby restricted. The political willingness to respect the position of the court becomes crucial. In the above cases, even though the courts held that the publications did not contain anything objectionable according to law, the government did not do enough to protect the publications from harm caused by the actions of non-state actors. In fact, it colluded, with the non-state actors at different moments, as visible in the case studies. However, it cannot be claimed that the government cannot resist the attack on publications. If the government wants, it can definitely restrain attempts by non-state actors to impose their will when the court has pronounced its judgment in a case. A clear example of this was the case of *Sachchi Ramayana* controversy.[610] The text *Sachchi Ramayana* was banned in Uttar Pradesh in 1969 after which, the Supreme Court held the notification order null and void on technical grounds. When the demand for its banning resurfaced in 2007, a demand lead by the opposition parties in the Legislative Assembly, the Bahujan Samaj Party (BSP) government under the leadership of the Chief Minister Mayawati used the court order as pretext to counter the demands.[611]

In the Indian context, the act of censorship is predominantly devised by means of an instrumental logic for the government. The legal landscape related to censorship gives primary importance to the judgment of the government in using laws. It is expressed both in the provisions of the statutory laws as well as the court judgments. It is assumed that the state, being the custodian and protector of law and order, would take fair decisions based on the merit of the case. However, as has been evident in the cases discussed in this chapter, the state has emphasized the need to protect the sentiments of different communities from hurt, primarily because there is a feeling that these

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610 The controversy attached to this text and the case has been discussed in details in chapter 4.

611 The demand was initiated by the BJP and supported by Mulayam Singh, the leader of the opposition Samajwadi Party on the floor of Legislative Assembly. See, "Periyar Ramayana Arouse Flak," *Deccan Herald*, November 6, 2007. The ruling BSP was accused of supporting the book and allowing its sale in the state. The state's Parliamentary Affairs minister Lalji Verma assured that the government was not aware that the book was on sale in UP. The accusations of the opposition did not affect the government which was, as it claimed, ignorant of the book and had nothing to do with it. He also cited that the Supreme Court had in past found nothing objectionable with the book and therefore it would not be possible technically for the government to ban it. See, "UP oppn. wants Periyar's Ramayan Banned, but not a Copy to Buy in State," *Indian Express*, November 8, 2007.

emotions could result in public order issues. It is further visible that collective mobilization in the name of hurt sentiments has the capacity to exert pressure on the state, to act against a controversial publication. This pressure could either be asserted through public display of hurt sentiments, which includes protest and demonstrations, (as in the case of Nasreen), or through the channels of political leadership, (as in the case of Rushdie), or through threats of causing disruption to public order, including the use of violence (as in the case of Acharya Tulsi). The ambiguity, which reflected the state's relationship with individual citizen, and its relationship with communities, gives identity-based claims to censorship precedence over individual's freedom of expression. This ambiguity was evident during the CAD, as discussed in Chapter 3. Further, the political mobilization of religious sentiments, a phenomenon that developed during the anti-colonial movement, continued in the times of electoral politics, after India became independent.[612] In the context of growing constraints developed by the pressure of highly competitive electoral democracy, no political party, either in government or in opposition, takes the risk of not attending to the claims of hurt sentiments as presented by socio-religious groups or other non-state actors.[613] As there is no way in which the claim of hurt sentiments be quantified – either in terms of the actual number of people hurt by the offensive publication, or the nature of the hurt caused – there is a constant fear that the controversy might take larger shape and affect the fortunes of the political parties – by diminishing their electoral support. Therefore, these parties prefer to act on the claims raised by socio-religious groups about religious offense, rather than protect individual's freedom of speech and expression.

The role of non-state actors discussed in this chapter appears to be essentially against freedom of speech and expression. It seems that the non-state actors impose their will by exerting pressure, either on the state agencies, or directly upon the author/publisher. But are all forms of intervention by non-state actors unjustified, or against the ethos of a democracy, where freedom of expression is held to be an important value? In the next

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612 This phenomenon, its growth during anti-colonial movement, and its role during electoral politics hae all been discussed in chapter 2.

613 Dhavan, *Publish and be Damned*, 151. Also see, Jaffrelot, *Religion*, *Caste and Politics,* 305.

section, I shall discuss the different modes of intervention by the non-state actors, and examine its impact on freedom of speech and expression.

3. The Debates over Censorship in India and the Role of Non-state Actors

One of the significant concerns for scholars of free speech in India has been the role of non-state actors.[614] Non-state actors, especially socio-religious groups, resort to both legal as well as extra-legal methods, to exert pressure on the government to act against a publication.[615] This includes mobilization and protests against a text[616], its author[617] or publication house[618], public burning of book[619], or even physical attack on the author[620]. The legal recourse includes filing writ petitions against the author or the publication house or against the book itself. The use of law to curtail freedom of expression has been discussed extensively in the last chapter.[621] In fact, legal practitioners and scholars

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614 This concern has been discussed by most of the scholars of censorship in India. See for example, Ghosh, "Censorship," 453; Someswar Bhowmik, "From Coercion to Power Relations: Film Censorship in Post-Colonial India," *Economic and Political Weekly* 38, no. 30 (2003), 3148-52; Liang, "Reasonable Restrictions," 439; Noorani, "Films and Free Speech," 11-12; Noorani, "Free Speech and Provocation," 2898.

615 Ghosh, "Alchemy of Hate," 60.

616 There were protests against Ambedkar's *Riddles in Hinduism* in 1989 which was led by the Shiv Sena and its legislators. See, "Parts of Riddles to be Dropped," *Times of India*, November 17, 1987.

617 In 2012, when Rushdie was to appear at the Jaipur Literature Festival, the Muslim organizations protested against his appearance on the pretext that he should apologize for his book *Satanic Verses*. "Oppose Rushdie's Arrival," *Radiance Newsweekly* XLIX, no. 42 (January 21, 2012). Most prominent Muslim organizations in India like Jamaat-i-Islami Hind, All India Imam Council, All India Milli Council, Jamaat-e-Ullema Hind, and Muslim Forum jointly addressed a press conference in Jaipur reiterating the demand. See, "Muslim groups oppose Rushdie's visit to Jaipur fest," *Hindu*, January 14, 2012.

618 The pressure exerted on Oxford University Press to remove Ramanujan's essay, "Three Hundred Ramayana." See, "When a Department let the University Down," *Hindu*, November 3, 2011.

619 See, "BJP Workers Burnt Copies of Sachchi Ramayana," October 30, 2007, http://news.webindia123.com/ news/articles/India/20071030/808600.html.

620 The attack on Taslima Nasreen is a clear example of this.

621 The case of Wendy Doniger discussed in Chapter 5, is indicative of this phenomenon.

like Dhavan and Noorani maintain that in India frees speech faces much a bigger threat from social censorship than state censorship.[622]

However, I argue that there are two significant problems with the scholarship on censorship in India, particularly with regard to the question about the role of non-state actors. First, there is a general tendency among scholars to relate the phenomenon of vocal and explicit forms of intervention by non-state actors (which includes the use of violent means) quite tightly with the period of the growth of Hindu nationalism, especially in the late 20th century.[623] Second, these scholars consider all forms of intervention by non-state actors – both legal and extra-legal – as unwarranted in a democracy like India. I argue that these estimations are based on overly broad generalizations. For example, even if we were to agree with the claim about the connection between explicit forms of intervention exhibited by non-state actors and the rise of Hindu nationalism in late 20th century, it fails to explain some crucial aspects attached to social censorship: a) considering that Hindu nationalism is not a new phenomenon in India, it fails to explain why social censorship took the shape it did, in the later part of 20th century; and b) it also fails to explain why it did not remain a Hindu nationalist agenda, as we see similar kind of mobilization and protests in response to Taslima Nasreen in West Bengal and in the Akali's response[624] to the interpretations of Adi Granth in Punjab. I have shown earlier in chapter 2 and 3, that the intervention by non-state actors, on the claims of religious offense, is not at all a new phenomena. Group mobilization on the subject of hurt sentiments has been a social reality in India even before Independence, particularly in the late 19th and early 20th century. In fact scholars like Gilmartin have shown how mobilizations of these kinds formed an

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622 Dhavan, *Publish and be Damned*, 151; Noorani, "Informal Censorship".

623 See, Kapoor, "Who Draws the Line?" 20; Ghosh, "Censorship"; Bose, introduction of *Gender and Censorship*.

624 The Shiromani Gurudwara Prabhandak Committee (SGPC) not only became furious at alternative interpretations of Guru Granth Sahib, but also announced punishment for the authors. See, "SGPC takes exception to book on Scriptures," *Times of India*, December 17, 1992. Also see, Piar Singh, *Gatha Sri Adi Granth and the Controversy* (Michigan: Anant Education and Rural Development Foundation, 1996).

alternative 'public' during the colonial rule.[625] The analysis of censorship after independence also gives a similar picture, where the claims of hurt sentiments were not only used to exert pressure on government to censor controversial texts, but were also considered as a legitimate and democratic form of engaging with the government.[626] Nor is it the case that these mobilization and protest were always non-violent in nature. The violence that erupted during the controversy over the book *Living Biographies of Religious Leaders* (as shown in chapter 3), and *Agnipariksha* (as discussed earlier in this chapter), reveal that explicit or even violent forms of intervention by non-state groups is not a late 20th century phenomenon, and it also cannot be directly linked to the growth of Hindu nationalism.[627]

The second issue is – whether all forms of intervention by non-state actors is symptomatic of the depleting space for democratic values. One mistake that the scholars who hold this view arguably commit is to assume the primacy of freedom of speech and expression, over all other rights.[628] Further, these studies use a teleological approach to judge the intentions of the non-state actors based on the consequences of such interventions i.e. the use of litigation or protest by any non-state actor as means to impose their viewpoint. It is argued that even if the non-state actors take the legal route, it leads to harassment of the author/publisher, and therefore, restricts the exercise of freedom of speech and expression.[629] I tend to disagree with some of these assumptions and conclusions. First, as courts have held in various judgments, freedom of speech and expression does not enjoy any primacy over other rights, including the right to religion, and therefore the courts have held that it is the duty of the state in a multicultural and

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625 See, D. Gilmartin, "Democracy, Nationalism and the Public: A Speculation on Colonial Muslim Politics," *Journal of South Asian Studies* 14, no. 1 (1991), 123–40.

626 As discussed in Chapter 3 in the case of the book *Living Biographies of Religious Leaders*.

627 It is to be noted that the controversy over *Living Biographies of Religious Leaders* took shape in 1956 and the violent protests were led by members of Muslim community. Similarly the controversy over *Agnipariksha* occurred in 1970, and saw clashes between members of Hindu and Jain communities, who had different views about the book. See, "Raipur under 24 hour curfew," *Times of India*, November 8, 1970.

628 This aspect is clearly evident in the writings of Sohini Ghosh, Brinda Bose, and Lawrence Liang.

629 See for example, the writings of Ratna Kapoor, Rajeev Dhavan, and Noorani.

secular society, like India, to balance conflicting claims based on such rights.[630] Second, on the subject of intervention by non-state actors, I believe that the practise of demonstrating or protesting against a publication, claimed to be religiously offensive, or demanding the state to act against such publications, needs to be differentiated from the other mode of objection- one that includes use of violence, which is legally prohibited in any democratic set up. Both these roles should be viewed differently, even if both have a tendency to restrict the scope of freedom of speech and expression, as the two modes of intervention by non-state actors exhibit a marked difference in both form and content.

My reasons for arguing this turns on the fact that forms of intervention which include using legal mechanisms or even the use of protests and demonstration to attract the attention of the government authorities towards their grievances against the contentious publication, are considered – both by the state as well as the judiciary – as democratic and legitimate rights of the citizens. However, there is an important caveat attached to this formal recognition of the democratic rights- that the protests and demonstrations should not be violent in any form. The position of the state is reflected in the reaction of Prime Minister Nehru and other leaders during the controversy of *Living Biographies of Religious Leaders*.[631] Though most leaders deplored the use of violence in the protests that followed the controversy, they were not critical of the subject of the protest itself. Not only Nehru, even K. M. Munshi[632], against whom most of the protests were directed, recognized that the claim of religious offence by the protesting Muslims was of a genuine concern. Therefore, the book was set aside as soon as the demands were raised without any form of engagement with the subject-matter under contention. Nehru, in his fortnightly letter to the Chief Ministers wrote: "I can understand people objecting to some passages in that book and drawing attention to them. But, there was something much deeper, and it was obvious that mischief was afoot and had been

630 This aspect has been extensively discussed in Chapter 4.

631 The details of the case has been discussed earlier in Chapter 3.

632 Other than being the Governor of the state of Uttar Pradesh, where the controversy took shape, K. M. Munshi was also one of the editors of Bharatiya Vidya Bhawan, the publishers of the book.

deliberately organized. The offending passages were broadcast in cyclostyled papers by the very persons who objected to them."[633] The real concern of these leaders was about the continuation of the protests, even after the demand for removal of the book was accepted. A clear demarcation was being proposed between legally claiming democratic rights, like the right to protest and demonstrate, to express one's grievances, and the illegal use of violence or incitement to violence for the purpose.

The position of the judiciary on the subject of use of legal route by non-state actors, to express their grievances, can be gathered from the courts' interpretation of statutory laws, particularly section 95 of CrPC, which deals with the power of the government officials to proscribe or forfeiture controversial publications.[634] The courts have insisted that government officials should mention in the notification (issued for seizure or forfeiture of such publication), the details about the groups or communities offended, the reason for them to feel offended, and how the officials reached a rational conclusion that forfeiture of the publication was necessary. The nature of the complaint registered, or protests and demonstrations organized by the socio-religious groups, in order to attract the attention of the state officials towards their grievances, are legally recognized by the courts, as valid grounds on which the official could justify its decision to act against the controversial publication. It can therefore be argued that these forms of intervention are held by the court as important, for the officials to form a conclusive opinion about whether action was required in a particular case or not. The complaint registered, or protests, are therefore recognized as legitimate means by the judiciary, in order to express grievances, and request the government officials to act.

Furthermore, there are primarily two forms in which the non-state actors intervene through the legal structure. The first is by registering formal complaints against the contentious publication in the local police station, or mobilizing and demonstrating against the publication to express their hurt sentiments, in order to exert pressure on the state officials to act. The second mode of engagement is by filing petitions against such

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633 Nehru, *Letters to Chief Ministers*, 436.

634 This aspect of the law has been discussed in greater details in Chapter 4.

publications, or taking part in the judicial process by filing affidavits in the court supporting government's decision to seize or forfeiture contentious publications. Although, in each of these forms of participation, the non-state actors play a dominant role, the ultimate decision of censorship rests with the courts. Note that, even if the state authorities register a formal complaint and decide to act against the publication in question, the author/publisher or any other affected party can, under section 96 of CrPC, approach the court against such action and the judiciary can then decide over the legality and validity of such action by the state authorities. The primary responsibility to act in such cases is that of state authorities, and they are expected (as reflected in various observations of the courts) to act rationally, judging the situation based on the principles of proportionality.[635] However, even if the state authorities falter in their decision-making, there is the judiciary to take the final call on the act of censorship. Therefore, the harassment caused to the author/publisher in the process is to be attributed to the laws and legal process, as discussed in Chapter 5, rather than the intervention by the aggrieved groups.

On the other hand, the use of violence and threats about causing disturbance to public tranquillity as a means to impose censorship by non-state actors does severely limit the scope of freedom of speech and expression. As evidence suggests, these threats or use of violence have regularly forced authors and publishers to succumb to the demands of the non-state actors, even after courts held that the publication did not contain anything that could be legally considered as offensive.[636] The use of these means are both illegal[637], and against the values of democracy. The courts have also been vigilant about non-state actors' use of threats and violence to impose censorship. They have held that the threat of disruption of public order by such groups is in

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[635] The court used the absence of "ground of opinion" in the notification as the reason to dismiss the order for forfeiture in cases like *Harnam Das*, A.I.R 1662; *Lalai Singh Yadav*, 1977 AIR 202, only because it was held that there was no way in which the court could assess if the official had reached to a conclusion to act against publication based on rational grounds.

[636] This aspect has been discussed earlier in the present chapter.

[637] Chapter VIII of the IPC deals with "Offences against Public Tranquility," and Chapter XII of the IPC deals with the subject of "Criminal Intimidation, Insult and Annoyance".

violation of the law and should be strictly dealt by law enforcing agencies.[638] Further, the courts have also taken serious note of the fact that state authorities relent to the demands of non-state actors, and act erroneously at times under pressure from these groups, as in the case of threat to public order. In *S. Rangrajan* case[639], the Supreme Court held that the state could not plead its inability to contain violent protestors. It is the duty of the state, the court maintained, to protect freedom of expression from attack from such groups. This position was reiterated in the court's judgment in *M/S Prakash Jha Productions*[640]. Recently, in *S. Tamilselvan*, the case related to Perumal Murugan's book[641], the Tamil Nadu High Court raised serious objections on the way state authorities, in an attempt to maintain peace, relent to the pressure exerted by protesting groups. Though it maintained that it is the duty of the state authorities to maintain law and order in their area, "the threat to peace" cannot be used as a reason for compromising anyone's freedom of speech and expression. It further noted: "Merely because a group of people feel agitated.... it cannot give them a license to vent their views in a hostile manner, and the state cannot plead its inability to handle the problem of a hostile audience." The court also specified a preferred procedure to be followed by the state authorities, while dealing with any controversial publication, if the claims about it being offensive are raised by socio-religious groups. Three points of the preferred guidelines are indicative of the approach of the court: a) "there is bound to be a presumption in favour of free speech and expression as envisaged under article 19(1)(a) of the Constitution of India unless a court of law finds it otherwise falling within the domain of a reasonable restriction under article 19(2) of the constitution of India. This presumption must be kept in mind if there are complaints against publications, art, drama, film, song, poem, cartoons or any other creative expressions"; b) "The state's responsibility to maintain law and order would not permit any compulsion on the artistes concerned to withdraw from his/her stand,

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638 The court has observed this in various judgments like, *S. Rangrajan v. P. Jagjivan Ram*, 1989 2 SCC 574; *M/S Prakash Jha Productions v. Union of India*, Writ Petition (Civil) No. 345 of 2011.

639 *S. Rangrajan*, 2 SCC 574.

640 *M/S Prakash Jha Productions*, Writ Petition (Civil) No. 345 of 2011.

641 The case and its different aspects have been discussed in details in Chapter 1. For the judgment see, *S. Tamilselvan,* W.P. No. 1215 of 2015.

and non-state players cannot be allowed to determine what is permissible and what is not"; and, c) "The state has to ensure proper police protection when such artistes come under attack from a section." The court has clearly stated that, the non-state actors cannot define the limits of a constitutional right, such as fundamental right to speech and expression, and the courts are the sole authorities to decide what constitutes "reasonable restrictions" as defined by the constitution. In the cases discussed above, it is clear that the courts have exhibited a zero-tolerance approach towards use of violence or threat to public order disruptions by these groups. The courts have further established that, though it is the duty of the state to maintain public order, the freedom of expression of any artist or author cannot be compromised in the name of threat to public order, and the state should deal strongly with groups that threaten disruption to public peace. It is evident from the above discussions that the two forms of intervention by non-state actors – legal and extra-legal – are essentially different in its form and content. It also has different impact on the legal space defined for the freedom of speech and expression. In the previous form of intervention, the courts are able to intervene and determine the reasonability of the action by the state authorities; whereas the later form of intervention is not only illegal, in this case, the non-state actors take upon themselves to determine the permissibility of an expression.

The distinction also helps to respond to the claims of the scholars on censorship, who believe that the presence of statutory laws governing freedom of expression allow the non-state actors to impose their will, by harassing the author/publisher, and on this basis, these scholars demand that all such laws be repealed.[642] Such claims are largely based on an assumption about the "slippery slope" tendency of laws. On the one hand, it assumes that all claims of religious offense, are essentially targeted against the author/publisher, and hence against the democratic values of freedom of speech and expression; and on the other hand, there is the assumption that if statutory laws are removed, it will end the arbitrariness attached to censorship due to the intervention of

[642] This kind of argument has been raised variously by scholars like Liang, "Reasonable Restrictions"; Ghosh, "Censorship".

socio-religious groups. However, both these assumptions seem to be faulty. The assumption that all the claims of religious offense are ploys to impose viewpoint of the non-state actors, seems to overlook or ignore that some of these claims may actually be genuine. The only institution that can judge these aspects is the judiciary, and scrapping of the laws will only limit the powers of the courts to intervene. As Saba Mahmood[643] and Tariq Modood[644] have shown, some religious beliefs and practices define the identity of the religious communities, and if these beliefs or symbols are denigrated, they will feel offended. These feelings can take the form of demonstrations and protests, and in absence of legal recourse, there are increased possibilities that these forms of expression of grievances turn aggressive, and cause real threat to public order.[645] Further, removal of statutory laws would also increase the arbitrary role of the state officials. These officials could use other available laws to their discretion, and could proscribe publications, or arrest author/publishers at will, in the name of preventing issues related to public order. After all, repealing laws governing freedom of expression does not disarm the officials of powers to act in such situations. So, unlike the assumptions of the scholars discussed above, repealing statutory laws may prove counter-productive, and may, in fact, add to the threats to freedom of speech and expression, and its free exercise.

A significant exception, however, are laws like Customs Act, which were used by the government to ban the import of publications like *Satanic Verses*, as the nature of these laws put the case of such bans beyond the purview of the judiciary. In cases like that of *Satanic Verses*, if the non-state actors are able to exert pressure on the government, they can get a publication banned, and even the judiciary cannot come to the rescue of these publications. Though this exception is significant, and probably requires a rethink on

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643 Saba Mahmood, "Religious Reason and Secular Affect: An Incommensurable Divide?" in *Is Critique Secular? Blasphemy, Injury, and Free Speech*, ed. Wendy Brown, Judith Butler, Talal Asad, and Saba Mahmood (Berkeley: The Townsend Center for the Humanities, University of California, 2009), 58-94.

644 Tariq Modood, *Multicultural Politics: Racism, Ethnicity and Muslims in Britain* (Edinburgh: Edinburgh University Press, 2005), 121.

645 In the Indian context, the form that such grievances could take is reflected in the violence that followed the publication of *The Satanic Verses*, even after the book was banned in India.

the part of lawmakers, repealing all statutory laws are not the solution to the intervention by the non-state actors. The right approach would be to argue for more vigilant government machinery, and a system of judiciary, that is able to restrain malafide intentions of the non-state actors, and at the same time take care of the genuine grievances.

4. Conclusion

The examples of *Satanic Verses*, *Dwikhandito*, and *Agnipariksha* indicate the ways the role of the courts is made ineffective in the politics of censorship, where on the one hand, the use of laws like the Custom Act place the government's decision outside the purview of the court's interference, and on the other hand, the general atmosphere of violence and threat renders even positive interference by the courts meaningless. Furthermore, the provisions restricting free speech in Indian context (like section 295(A) and 153(A)) are classified as cognizable offences. This means that the authorities can arrest suspects without judicial sanction. At the same time, there have been cases, where the government takes the role of mediator between conflicting claims (that of religious offense and freedom of expression), and reached for an out-of-court solution, while the case was still sub-judice.[646] Though the government was well within its power to look for amicable solutions, it indicated the limitation of the scope of the courts in such matters. The Tamil Nadu government's position during the controversy related to the movie *Viswaroopam*[647] is one such

[646] Examples of this kind can be found in the case of Maharashtra government's intervention in the *Riddles in Hinduism* case. The controversy was about the government's decision to publish this essay written by Ambedkar, which was essentially targeting the Hindu gods, Ram and Krishna. Details of the controversy are discussed in, Vaibhav Purandare, *The Sena Story* (Bombay: Business Publications Inc., 2002), 306-14.

[647] Viswaroopam was a 2013 film produced and directed by popular actor Kamal Hasan. The movie had acquired required certificates from authorities. But before release was caught in a controversy where Muslim groups argued that the representation of Muslims in the film had hurt Muslim sentiments. The actor took the issue to the court but before the court could give its final verdict the chief minister of the state intervened and helped the two parties reach an amicable solution which included deletion of some scenes and muting some portions. The film later released. See, "Muslim Organizations demand ban on 'Viswaroopam'", *Indian Express* (Online Ed.), January 23, 2013, http://www.indianexpress.com/news/muslim-organisations-demand-ban-on-vishwaroopam/1063259/; "Amicably settle Vishwaroopam row," *New Indian Express* (Online Ed.), January 29, 2013, http://newindianexpress.com/states/tamilnadu /article1440303.ece.

example. The problem is that in an attempt to find solutions, the government often manages different claims in such a way that freedom of expression is compromised. The settlement, though claimed to be "amicable," opens doors for more possibilities to assert the claim of hurt religious or communitarian sensibilities leading to a virtual curb on authors/artists freedoms. So considering these cases, can we conclude that the role of the courts is of no use, and does not contribute at all in our understanding of freedom of expression in India? There are two ways to look at this issue. One approach is provided by Gautam Bhatia in his book *Offend, Shock or Disturb: Free Speech under the Indian Constitution*[648], where he argues that a study of the role of court remains important as the laws are used or misused because the laws exist, and despite several constitutional challenges, the courts have not ruled against these laws. So we need to understand why these laws are considered important by the courts. Secondly, Bhatia is optimistic about a situation when law and practice "is not as cavernous" as in present times. So, it is essential for those future situations that a critical understanding of the application of these laws is understood. Another way to look at the subject is that though the courts have not controlled the direction of free speech debate in India, they have always remained an important stakeholder, and their observations have guided the debates outside. The lack of consistency and procedural problems, as discussed in the last chapter, remains a problem, but the authority of the court has in many cases protected the fundamental right of expression from attack of both state and non-state actors. It is therefore an important institution, which still enjoys the confidence of the citizens as the protector of their fundamental rights. This in itself is a reason good enough to not dismiss the role played by the courts in the debates around censorship and free speech.

On the subject of intervention by the non-state actors, in the process of censorship, I have argued that the two forms of interventions – one that follows the legal route, and the other that is extra-legal, and includes use of threat and violence – need to be viewed differently. Both of these interventions are different in form and content. To consider both as unwarranted in a democracy, I have shown, would be to close all doors for even

[648] Bhatia, *Offend, Shock or Disturb*.

genuine expression of grievances. This distinction helps us to be more sensitive regarding the concerns of religious communities, about offensive publications, and at the same time, ensures that proper judicial scrutiny takes place before any form of censorship is enforced. It would further help in reducing arbitrariness in the process of censorship, a complaint that scholars on censorship in India consistently make, particularly with regard to the involvement of non-state actors.

CHAPTER 7
CONCLUSION

1. Introduction

In the last few decades, two incidents – the publication of Salman Rushdie's *The Satanic Verses* (1989), and the publication of cartoons of Prophet Muhammad by Denmark based Jyllands-Posten (2005) – became subject of intense debate regarding freedom of expression and the issue of religious offense. During both these controversies, the publications were repeatedly criticized for offending religious sensibilities of Muslims, and there was debate whether legal sanctions were justified in cases related to religiously offensive speech acts. The two cases were very similar in most of the relevant respects, and in fact the critical discussions that followed the cartoon controversy, were framed very much like those during Rushdie affair, even drawing explicit parallels with and analogies from the latter. However, here I am primarily concerned with the debates surrounding the legal aspects attached to the controversy. Some of the important questions that became subject of intense debate among academicians and scholars, after both these incidents were: Can legal sanctions be invoked in the name of protecting religious sentiments in multicultural and multi-religious societies? Is the state justified in restricting freedom of speech and expression in order to prevent religious offense or to diffuse the threat to law and order situation that could follow such offense? Is there any provision for a "right not to be offended" within the liberal discourse? All these questions were discussed and debated by scholars of law, politics and anthropology in the light of "Rushdie affair" and the "cartoon controversy" and saw deeply divided opinions.

Both the incidents witnessed protests from members of the Muslim community all over world. It was claimed that the publications desecrated their deeply cherished religious

values,[649] offended their religious feelings[650], and discriminated against Muslims, which was unacceptable.[651] Some commentators argued that Rushdie and Jyllands-Posten had only exercised their freedom of expression, and the call for restriction was unwarranted, no matter how much they may have disturbed or offended a particular community. Posing religion as a matter of public interest, it was held that in a democracy, every aspect of religion should be open to scrutiny in all possible forms.[652] It was also argued that incidents like "Rushdie affair" tested the toleration of the community that claimed religious offense, and therefore was a good thing.[653] Furthermore, even if it was agreed that hurting religious sensibilities, as claimed in the two cases, was morally wrong, and that the argument about respecting other's religious sensibilities had strong moral appeal, it could not justify the use of law in these cases.[654] Legal philosopher Ronald Dworkin opined, that legal sanctions were also not justified because the claims about religious offense were sentimental and subjective, and hence, not eligible for legal protection. He further asserted that "in a democracy no one, however powerful or important, can have a right not to be insulted or offended."[655] On the question about legal sanctions against freedom of speech and expression, in cases such as that of Rushdie and Jyllands-Posten, where members of one religious group were demanding such sanctions in the name of religious offense, it was argued that any such protection could lead to a slippery slope. Preventing religious groups from hurt in such cases, free

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649 Anver M. Emon, "On the Pope, Cartoons and Apostates, Sharia," *Journal of Law and Religion* 22, no. 2 (2007), 303-21.

650 Guys Hoarsher, "Rhetoric and its abuses: How to oppose Liberal Democracy while speaking its language," *Chicago-Kent Law Review* 83, no. 3 (2008), 1225-53.

651 Tariq Modood, "The Liberal Dilemma: Integration or Vilification?" *Open Democracy*, February 8, 2006, http://www.opendemocracy.net/content/articles/PDF/3249.pdf; Sune Laegaard, "The Cartoon Controversy: Offense, Identity, Oppression," *Political Studies* 55, no. 3 (2007), 481-98.

652 Dworkin, "The Right to Ridicule"; Robert Post, "Religion and Freedom of Speech: Portraits of Muhammad," *Constellations* 14, no. 1 (2007), 72-90.

653 Jeremy Waldron, "Rushdie and Religion," in *Liberal Rights* (New York: Cambridge university Press, 1993), 134-42.

654 Jones held that if people are offended they are liable to express their protest and the advocates of free speech should have no problems with that. See, Peter Jones, 'Respecting Beliefs and Rebuking Rushdie', in *Liberalism, Multiculturalism and Toleration*, ed. J. Horton (Basingstoke: Mcmillan, 1993), 118. This argument has also been endorsed by Dworkin and Waldron.

655 Dworkin, "The Right to Ridicule," 53.

speech scholar Eric Barendt feared, could become a thin disguise for protecting religious beliefs and truths, which had been resisted during the debates against blasphemy laws.[656]

Some scholars raised reservations about the way the debate was being posed as a binary between objection to blasphemy and free speech,[657] and it was argued that in the name of liberal discourse, commentators often ignored and rendered unintelligible the kind of injury involved in religiously offensive speech particularly those that vilified the sacred.[658] Questioning those who opined that religious offence was subjective and sentimental in nature, Saba Mahmood and Talal Asad argued that religion was something that was inherited and naturalized, which got manifested in one's practices, and lived social realities.[659] Without understanding this aspect of religion, they argued, it was not possible to debate the harm caused by religious offense. However on the question about whether legal protection to religious feelings was justified, both Asad and Mahmood differed. Asad held that if "modern secular societies do have legal constraints on communication" such as copyrights, patents and others, questions should not be raised if restrictions on free speech are advocated to prevent religious offense, even if it leads to blasphemy laws.[660] Mahmood, on the other hand, believed that the laws do not have the capacity to provide remedy for the harm suffered due to religious offense and so she suggested that the legal recourse cannot be a valid or appropriate demand on the part of the communities who protest against such offenses.[661] A similar view is articulated by Tariq Modood, who viewed it as a problem of multiculturalism, and argued that religious beliefs form the self-definition of a group, and incidents such

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656 Eric Barendt, "Religious Hatred Laws: Protecting Groups or Beliefs," *Res Publica* 17, no. 1 (2011), 41-53.

657 For example, see Mahmood, "Religious Reason"; Talal Asad, "Free Speech, Blasphemy, and Secular Criticism," in *Is Critique Secular?* ed. Wendy Brown et al., 14-57.

658 Mahmood, "Religious Reason," 61-65.

659 Ibid., 68-72; Asad, "Free Speech, Blasphemy," 30-40.

660 Talal Asad, "Freedom of Speech and Religious Limitations," in *Rethinking Secularism*, ed. Craig Calhoun, Mark Juergensmeyer, and Jonathan VanAntwerpen (Oxford: Oxford University Press), 283.

661 Mahmood, "Religious Reason," 82-83.

as the Rushdie affair and cartoon controversy have a deep impact in the group's participation in society.[662] Though he opined that legal restrictions might not be the most appropriate solution and societies need to develop alternate mechanisms to ensure that oppression caused due to such incidents are avoided, he insisted that freedom of expression could be curtailed to protect vulnerable groups and individuals from attack on their deeply held beliefs.[663] So, though these scholars believe that the debate around free speech should be sensitive to the sentimentalities of communities that claim religious offense, they have different views on whether legal sanctions can really help in the situation.

An alternative view is represented by political philosophers Charles Taylor and Bhikhu Parekh, who have maintained that the question of restricting free speech would depend on the context, in which it is being dealt with.[664] They are of a view that free speech should be balanced with other rights and values that are cherished in a society. However, "there is no "true" way of reconciling them; it all depends", Parekh says, "on the history, traditions, political circumstances, and so on of a society."[665] This view advocates a context-sensitive approach to the understanding of religious offense. The diversity of legal provisions and restrictions regarding freedom of speech and expression in different countries is representative of the point that Parekh and Taylor have stressed.

Take for example, the legality involved in above mentioned cases in the countries which became central to the controversy – Britain in case of Rushdie affair and Denmark in case of cartoon controversy.[666] *The Satanic Verses* was prohibited on legal

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662 Modood, *Multicultural Politics*, 121.

663 Ibid., 121.

664 Taylor, "Rushdie Controversy," 118-121; Parekh, "Is There a Case for Banning Hate Speech?" 55.

665 Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge, Massachusetts: Harvard University Press, 2000), p. 320.

666 The legal dimensions of the cases have been discussed in details in the following books, among others. Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 2002), 187-88; Langer, *Religious Offense*, 50-90.

grounds in numerous Muslim countries, including Saudi Arabia, Somalia, Bangladesh, Sudan, Malaysia, among others. In Britain a case was filed by Abdal Hussain Choudhury, on behalf of the British Muslim Action Front[667], to the Chief Metropolitan Stipendiary Magistrate to issue summons against Rushdie and his publishers for alleged blasphemous libel.[668] When the appeal was rejected, he appealed to the Queen's Bench Division of the High Court. The High Court upheld the decision of the Metropolitan Magistrate and commented that even if the publication was religiously offensive to the sensibilities of the Muslims, the blasphemy law in Britain was applied only to the protection of Christian religion, and the same to could not be extended to protect any other religion.[669] Choudhury took the appeal to the ECtHR. In *Choudhury v. United Kingdom* the appellant contended that the English law was prejudicial against Islam. However, the appeal was declared inadmissible by the Commission, as it held that there was no positive obligation on states under ECtHR laws to protect all religious sensibilities.[670] The central claim made by the appellant in these cases was based on the argument that the law of blasphemy should be extended to protect all religious groups in the country, and could not be limited to the protection of only the religion of the majority. Though the law at the time could not be invoked in the case, it built a larger consensus on the subject, which was also reflected in the abolition of blasphemy law[671] and it being replaced by a more egalitarian and inclusive Religious and Racial Hatred Act 2006.

In the cartoon controversy, although complaints were filed, the editors or publishers were never taken to court since the Danish Public Prosecutor decided that the cartoons did not violate the law. The Danish penal code makes it a criminal offence "to

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667 British Muslim Action Front was a group organized to protest against the religious offense caused by the publication of *Satanic Verses*.

668 As discussed in details in R. v. Chief Metropolitan Stipendiary Magistrate, exp. Choudhury (Queen's Bench Division), (1991) 1 QB 429 (1990).

669 Ibid.

670 Choudhury vs. United Kingdom, (1991) Application No. 17439/90, ECommHR.

671 The common-law offences of blasphemy and blasphemous libel in UK were abolished by the Criminal Justice and Immigration Act 2008.

publicly mock or degrade the religious beliefs or worship of any legal religious community" (Penal Code 140). It also makes it an offence for anyone to make utterances that are "threatening, insulting or degrading to a group of persons due to their race, skin colour, national or ethnic origin, faith or sexual orientation" (Penal Code 266b). However, the Regional Public Prosecutor in Viborg, who was entrusted with the investigation in the cartoon case, maintained that though some cartoons had capacity to ridicule or express disdain for Muslims' religious beliefs, as protected under blasphemy clause, it did not constitute an infringement of the clause.[672] It further exempted it from violation of racism clause as it only depicted an individual and could not be held to mean against whole community. Though the Public Prosecutor maintained that freedom of expression had to be exercised with respect for other human rights, he argued that the journalists responsible for the publication of the cartoons could not be held to be in violation of the legal codes.[673] The legal question in the cartoon controversy was whether the publication of cartoons qualified as acts punishable within the penal codes of Denmark, and the Public Prosecutor provided a wide interpretation of the law claiming exemption of such acts from law under the guise of editorial freedom. The legal provisions in Britain and Denmark differed on how to treat blasphemous libel. Britain had a law against blasphemy, but it only protected Christian religion, and although the courts agreed that the novel was religiously offensive, the limitations of the blasphemy law became the justification for the courts to reject a case against Rushdie and the publishers of the novel. In Denmark, on the other hand, there existed provisions within penal codes that defined religious offence in clear terms, and was applicable to all religious communities, but the Public Prosecutor did not find the law applicable to the kind of offence in the cartoon controversy. On these bases the governments in the respective countries decided not to act legally against the publications.

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672 Rigsadvokaten (Director of Public Prosecutions), (2006) J. Nr. RA-2006-41-0151.

673 Summarized in *Rigsadvokaten*, J. Nr. RA-2006-41-0151; Kasem Said Ahmad and Asmaa Abdol-hamid v. Denmark, (2008) Communication no. 1487/2006, CCPR. The response of the Danish law in the controversy has also been presented effectively in Stephanie Lagoutte, "The Cartoon Controversy in Context: Analyzing the decisions not to prosecute under Danish law" *Brooklyn Journal of International Law* 33, no. 2 (2008), 379-404.

Contrast this with the response to the same publications in India. As shown in chapter 6, the Indian government pronounced a ban on the import of *The Satanic Verses* under Customs Act citing it as a "pre-emptive step" to avoid public order problems. The Customs Act used for the purpose cannot be challenged in the judiciary and hence no formidable case law followed on the subject. However, regardless of the blanket ban communal disturbances, including violence was reported from different places in India where Muslims took to street to protest against the book and its author Rushdie. In case of the cartoon controversy, a few newspapers in India reprinted the controversial cartoons published by Jyllands-Posten which included the Patna edition of the *Times of India*.[674] The government reacted immediately against the initial publishers, and this prevented large scale reprints. The arrests were primarily under section 295(A) and 153(A) of IPC, which are meant to prevent religious offense and incitement of hate. Moreover, in an official release, the Indian government made its position clear, that the government was "deeply concerned about the growing controversy over the publication of cartoons that offend the Muslim community worldwide," and that it was "incumbent on all of us to be sensitive to the beliefs and sentiments of others and avoid all actions that cause hurt to them."[675] The government was concerned in the way the protests against the cartoons had turned violent and converted to riots in different cities like Srinagar, Patna, Lucknow. The Indian government, fearing strong protest and demonstrations, cancelled the proposed state visit by Danish Prime Minister, Rasmussen.[676] The government had indicated that it was not satisfied with the way Denmark had handled the situation, especially refusing legal actions against Jyllands-Posten. At the same time it had also signalled that if any one reprinted or published such cartoons, it would be dealt strongly under the available laws.

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674 The cartoon controversy in the Indian context has been discussed in details in, Ritu Gairola Khanduri, *Caricaturing Culture in India: Cartoons and History in the Modern World* (Cambridge: Cambridge University Press, 2014), 288-293.

675 There was a lot of pressure on the government to take some position which is also reflected in the debates of the Parliament, particularly in the Rajya Sabha where the top leaders of the opposition party like Sushma Swaraj and Ravi Shankar Prasad questioned the position of the government and criticised its inability to contain violence in different parts. See, *Rajya Sabha Debates*, February 20, 2006, 171-179; March 8, 2006, 100. The official press release is available at the website of Prime Minister office, "Govt. Expresses concern over publication of cartoons that offend religious sentiments," http://archivepmo.nic.in/drmanmohansingh/ content_print.php?nodeid=389&nodetype=1.

676 "Cartoon row kills Danish PM's visit," *Hindustan Times*, March 18, 2006.

The legal means available with the Indian government were primarily the statutory laws like section 295(A) and 153(A) of the IPC, and section 95 of the CrPC. Section 295(A) and 153(A) are punitive in nature, where violation of section 295(A) can amount to arrest of publishers or authors who are found to be deliberately engaged in outraging religious feelings or insulting religion or religious beliefs of any class, and violation of section 153(A) can lead to similar punishments for those who are found to be engaged in spreading disharmony, ill feeling or hatred between different religious groups. Section 95 of CrPC, on the other hand, is preventive in nature and pertaining to seizure and forfeiture of publications in case such publications are found violating section 295(A) and 153(A) of the IPC. Indian laws, in that sense, do not just protect the enraged communities from religious hurt, but also provides strong protection to religion and religious beliefs of different communities from insults. This provides a wide net for the government authorities to act in cases where a publication is found religiously offensive and contentious. In cases of proscription and forfeiture, the only legal reprieve is section 96 of CrPC, which allows the aggrieved party to approach court against the governments' action. However, the law is so framed that rather than the government defending its act of seizure/forfeiture in the court, the onus of proving innocence falls on the author/publisher where they are expected to justify that their acts do not fall under the category of offense as defined by the above mentioned statutory laws.[677] Legal scholars opine that such laws not only make it very difficult for the advocates/defenders of freedom of speech and expression, but also paves way for the executive to respond to the claims of hurt sentiments, without serious examination of either the scope of the law, or the substantive principles laid down by various courts in such cases.[678] The above discussions reflect the context-specific nature of laws and their implementation for similar cases in different societies. In every society, the nature of laws to restrict freedom of expression corresponds to the needs and challenges that led to the creation of such laws, and allows its existence in whatever form. In UK, for example, a need was realized, according to changing demography and nature of society, to abolish blasphemy laws, and replace it

[677] This interpretation of law has been defended by the supreme court in various cases like *Lalai Singh Yadav*, 1977 AIR 202; *Sri Baragur Ramachandrappa*, 5 S.C.C. 11.

[678] Liang, "Free Speech and Expression," 823.

with a different set of laws that protected all religious and racial communities. In the case of India, the creations of the statutory laws bore a colonial legacy, and were created to respond to a specific set of issues that were dominant in the Indian society – to curb the tendency to ignite communal hatred that led to violence. Subsequently these laws amended, as and when required, according to the demands of the context.

2. Governing Freedom of Speech and Expression in India: The Colonial Laws and its later *avatars*

The statutory laws that continue to define freedom of speech and expression in contemporary India had colonial origins. In chapter 2, I have shown that colonial subjects were portrayed as highly excitable and corruptible by lawmakers like Macaulay and Fitzjames Stephen. It was claimed that these emotional subjects were easily prone to taking offense and responding violently, especially where the issue of religion was involved.[679] The context of communal clashes at different times laid the foundation for addition of new laws in the penal codes drafted by Macaulay, and adopted in 1860. The British approach to laws governing freedom of speech and expression reflected a two pronged strategy, strictly guided by the instrumental logic to serve the colonial interests. On the one hand, they aimed to seek legitimacy among Indians as neutral arbitrator of conflicting religious interests of different religious groups, and for this purpose they had a conscious and pragmatic approach, towards the nature and scope of each law they constituted.[680] On the other hand, for all practical purposes, they wanted to avoid being seen as supporting a particular religious community, and hence, during religious controversies, they practised "selective censorship" based on instrumental calculations. At the same time, Indians had a dubious attitude towards freedom of speech and expression in the colonial context. So, they were demanding extensive freedom of expression in order to criticize the government, an argument derived from the consequentialist theories of free speech, which claimed that free speech was necessary to arrive closer to truth and beneficial for governance. However, where such liberty was seen as leading to religious

[679] Ahmed, "Spectre of Macaulay," 172-205.

[680] Reflected in the debates over the formation of section 295(A), as shown in Chapter 2, of this thesis.

offense, Indians not only demanded for censorship from the government, but also participated actively in the legislatures to ensure successful creation of new laws. Legislative debates of the time reveal that they were not just mute observers in the law making process, rather they participated actively in critically analyzing the scope and limits of such laws. During the making of section 153(A) and 295(A), Indian legislatures made significant impact both in criticizing the colonial government, and at same time, pitching for a rational law that could prevent vilification of religious personalities, and incitement to religious hatred.[681] Several leaders also cautioned against granting too much power to the executive as it could impact the freedom of speech and expression in significant way.[682] However, an overwhelming support to the proposed amendments and additions in the IPC reflected a general consensus among Indians leaders that freedom of speech and expression should be limited in cases where it could cause religious harm or incite hatred in the name of religion or other forms of community based identity.

This analysis presents a picture of the free speech debate in the colonial period as contrary to the one forwarded by legal scholar Arun Thiruvengadam, who characterizes the different historical periods in India's free speech experience, and argues that during the anti-colonial struggle it presented a "universalist" nature, that got subsequently replaced by "particularistic" concerns during the constitution making process, and led to the inclusion of several grounds of restrictions.[683] I have shown, on the basis of debates

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[681] For example, during the discussions over the introduction of section 153(A) in the penal codes, Select Committee member, P Ananda Charlu, described the enactment of section 153(A) "as a dangerous piece of legislation and has been impolitic (among other reasons) by necessitating Government to side with or to appear to side with one party as against another." He said, "In my humble judgment it will only accentuate the evil which it is meant to remove. Far from healing the differences which still linger, or which now and then come to the surface, it would widen the gap by encouraging insidious men to do mischief in stealth." See, Select Committee Report, *Gazette of India*, Part V (February 5, 1898), 15. As a member of the select committee though he registered his dissent, he voted for the bill in the council and section 153(A) was passed there with 18 members in favour and 4 against the amendment to the criminal laws.

[682] These concerns were raised by Indian representatives like Ananda Charlu and Maharaja of Darbhanga during the debates over section 153(A) in 1898 and members like Lala lajpat rai and Mohammad ali jinnah among others during the debates over section 295(A) in 1928.

[683] Arun K. Thiruvengadam, "The Evolution of the Constitutional right to Free Speech in India (1800-1950): The interplay of Universal and Particular Rationales," University of Washington Trans-Pacific Comparative Constitutional Roundtable on Dec 06, 2013; Centre for Asian Legal Studies, National University of Singapore, Working Paper Series, http://papers.ssrn.com/sol3/papers.cfm? abstract_id= 2470905.

surrounding religiously offensive publications that such a "universalist" approach never existed, and the Indian leaders, in the name of probable harm that such publications had caused, aggressively advocated its curtailment through legal means.[684] At best, the position of Indian leaders on freedom of speech and expression can be described as an ambiguous one when the same freedom was used to vilify religious texts and religious personalities.

The "particularistic concerns" that Thiruvengadam has discussed, dominated the debates in the post-independence period. These concerns included the context of partition and the communal violence that it accompanied. It inspired the constitution makers to severely limit the fundamental right promised under article 19(1)(a) by adding a number of caveats under article 19(2). In this split that was manufactured between article 19(1)(a) and 19(2) there was also an inherent dichotomy. This dichotomy, as also argued by legal scholar Lawrence Liang, was that article 19(1)(a) imagined a citizen as rational subject capable of exercising its complete autonomy in speech acts, whereas article 19(2) reflects the challenges of an affective public sphere, where the individual is seen as corruptible, and prone to outrage and provocation.[685] This same imagination about majority of Indian citizens being emotional beings, who lacked "maturity" particularly on matters related to religion, also became the rallying point for the introduction of significant amendments to the constitution and other statutory laws. The law makers took it as their duty to provide a safety net in order to protect common people from the misuse of freedom of speech and expression. Law was also seen here as a medium to inculcate the values of toleration and disciplining citizens.

Two inter-related points need to be made about the amendments of the constitutional provisions as well as the statutory laws governing freedom of speech and expression. Firstly, each of these amendments was introduced in a context of urgency. This urgency was borne out of the challenges that the executive was facing at different moments. For

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[684] See Chapter 2.

[685] Liang, "Free Speech and Expression," 818.

example, the first amendment followed the decisions of the courts, where a very expansive definition of article 19(1) was provided by the judiciary. The government felt that in the context of partition and the challenges offered to internal security by the separatist movements, such judgments could encourage the misuse of freedom of speech and expression. Similarly, when the statutory laws were amended in 1961 and 1969, it was in reaction to the series of communal riots that had occurred on each of these occasions in different parts of the country. The government had significant evidence to prove a negative role played by the regional press in deteriorating communal situations, and the amendments were aimed at making laws more stringent, in order to prevent the misuse of freedom of speech and expression in the guise of press freedom. A second interrelated point is about the approach of the lawmakers. As the laws were amended in a context of urgency, there was a general lack of "legislative pragmatism."[686] The debates in the Parliament suggest that the concern about the context overshadowed any concern about the possible repercussions of the changes introduced in law. The issue about freedom of speech and expression scarcely appeared in the debates, which were dominated by a concern to increase the powers of the executive, to deal with communal violence. Even if concerns about freedom of speech and expression were raised in the Parliament, it was used as a theoretical tool by the opposition to attack the government, and to expose its insensitivity towards fundamental rights. The debates did not reflect at any stage the multiple impacts that any amendment act could have on the future of freedom of speech and expression. For example, it was assumed that sections 295(A) or 153(A) were being amended to control press freedom, in order to prevent its role in inciting hatred among different religious communities. Overlooked, though, was the possible impact that such changes could have on other forms of expression, such as publication of scholarly work, especially controversial historical accounts, satires, novels, or any other form of art, including movies, paintings, among others. There was no discussion about how to prevent the possible overspill of the amendments on freedom required for these forms of expression. Each time such amendments were debated in the Parliament, in 1961 and

[686] I use here the expression from Nair, "Beyond the 'Communal' 1920s."

1969, the concern for public order trumped all other concerns, including those related to scope of freedom of speech and expression in general.

This overemphasis on public tranquillity and order also guided the proactive role of government agencies, in censoring or forfeiting publications or arresting authors/ publishers, when controversies related to such publications surfaced wherever it was claimed to be hurting religious sentiments, or inciting religious hatred among communities. The underlying assumption, that the Indian citizens lacked the capacity to handle hurtful speech, and could be easily swayed by the passions released if the subject under discussion was religion, allows as Pratap Bhanu Mehta argues, for a paternalistic role of the state, where the state takes part in the controversy only as a protector of public order, and not as a defender of free speech.[687] This assumption is reflected in the IPC which uses language of "outrage", "disgust", and "pain" to regulate speech, and also in the fact, that most statutory laws regulating religiously offensive speech acts are cognizable offences[688] and are non-bailable[689] in nature. The effectiveness of these laws are further buttressed by the legal defence such laws enjoy under the aegis of article 19(2) of the constitution, that pronounces "reasonable restrictions" to the freedom of speech and expression. Consequently, the laws governing freedom of speech and expression in India have allowed a wide net for executive control. As a result the authorities deem it prudent to play it over-safe whenever they sense a threat to law and order , and the general approach is to ban a book, or proscribe it, or/and arrest the author/publisher, at the slightest controversy where the claim of religious offence is involved. The authorities claim that the aggrieved person has every right to approach the relevant court and obtain a judicial verdict in his/her favour. On the one hand, it helps officials to temporarily pacify the prevalent law and order situation, and on the other hand, if there is any breach of peace following the judgment from the court, the executive can put the ball in the court of the judiciary, and disclaim the responsibility of

687 Mehta, "Passion and Constraint," 330-332.

688 Cognizable offence is one where the police does not require prior approval either from the state government or any warrant from the court. It can act *suo motu* in such cases.

689 Non-bailable means that the accused cannot be granted bail with the case being heard in court of law.

the incumbent situation, by citing its alertness at the earlier instance.[690] In the next section, I shall discuss the role of the judiciary in defining "reasonable restrictions" vis-a-vis freedom of speech and expression, and how its attitude and approach impacts, the debates about free speech.

3. "Reasonable Restrictions" to Freedom of Speech and Expression: Courts and the Question of Religiously Offensive Publications

From colonial times, the courts have played a significant role in defining the scope of freedom of speech and expression.[691] However, the importance of this role of the court became more prominent after independence, when freedom of speech and expression became a fundamental right, and the judiciary was hailed by the constitution makers as the sentinel of fundamental rights. One of the central questions with which I began this thesis was: how have the courts in India interpreted laws and defined "reasonable restrictions" concerning freedom of speech and expression vis-a-vis the claims of religious offence? This issue has been discussed in chapter 4, where I argue that in the process of judging claims about religious offense, the courts have primarily employed two set of approaches. On the one hand, unlike the international standards, the Indian courts have downplayed the "manner-matter" distinctions with regard to speech acts, and on the other hand it has maintained a distinction between the punitive laws and the preventive laws. Both these approaches give a wide latitude for executive action over contentious publications, that were claimed to be hurting religious sensibilities. The emphasis on the form or "manner" in which an idea is presented helps the court in judging two important aspects: a) the intention of the author or *mens rea* as required under section 295(A) and 153(A) of the IPC; and b) to measure the intensity of the "hurt" caused by the publication for which the court uses the "reasonable man's standards", which mandates that the publication should be judged from the standards of

690 See, Dhavan, *Publish and be Damned,* 145. Dhavan calls this a "problem solving" politics used by government authorities to counter threats on public order in such cases.

691 This was particularly true about cases related to charges of sedition, but equally visible on issues of religious offence, as discussed in chapter 2 in the *Rangila Rasul* case.

strong, rational individual, and not one who is emotional and prone to feeling hurt even at small issues. However, the nature of statutory laws like 153(A), which allows for punishment if there is an attempt to incite hatred between different communities; and at the same time the absence of clear demarcation between "manner" and "matter" of speech, has allowed the courts to also take into account the "matter" of the publications in judging such cases. For example, the freedom to criticize religion is only allowed by the courts if it pertains to practices of that religion, and does not extend to its principles or basic tenets. In order to judge whether a publication has exceeded the permissible limits, the courts look into the "matter", or content of the publication. At times, even if no vile language is used, the publication may include "matter" which is prohibited. The use of restrained language, or even claims of historical truth, the court has ruled, cannot be a justification for that publication. The same applies for cases judged for section 153(A). Even if language of the publication is docile, it may include 'matter' that can incite hatred among religious communities, and hence falls under the category of punishable speech act. In terms of doctrine, this is in sharp contrast to the international standards, where the principles of content-neutrality and value-neutrality are strongly followed.[692]

The distinction that the courts have maintained between the "punitive" and "preventive" laws is equally significant. The courts have held that in cases involving punitive laws, like section 295(A) and section 153(A) of the IPC, which may lead to punishing the author/publisher, it is mandatory to prove *mens rea*, or that there was deliberate and malicious intention involved in causing religious offense through the publication. But in cases which involve seizure or forfeiture of the publication, primarily under section 95 of the CrPC, the courts have held that looking for *mens rea*, is not a mandatory requirement. It has been left to the judgment of the executive to proscribe or seize publications, on the basis of the prospective harm the publication can cause, either in the form of inciting hatred or hurting religious sensibilities. So, in order to punish an author/publisher, the government needs to prove the intention of the individual, but in case of seizure or forfeiture the perception of the government officer shall be supreme.

[692] This is particularly true about free speech in US and Europe.

The repercussion is that, in cases where there are complaints against any publication on account of insulting any religion or inciting religious hatred, even if the government is not able to ensure that the author/publisher is penalized, it can proscribe or forfeiture contentious publications. This position renders a greater vulnerability to the publication against which charges of causing religious offense are levelled.

In the above discussion, I summarized the dominant approach that courts' judgments reflect in its dealing with the subject of religious offense. In the next part, I highlight the grounds on which the courts allow restrictions of freedom of speech and expression when the claim of religious offense is raised against a publication. Firstly, it should be pointed out that in various cases the courts in general, and Supreme Court in particular, has upheld the constitutionality of the statutory laws that the executives use to restrict freedom of speech and expression.[693] As of now, the courts have taken a position that these laws fall well within the definition of "reasonable restrictions" as provided under article 19(2). Further, the most important justifications used by the courts for upholding the restrictions over freedom of speech and expression include: a) the threat to public order posed by the publication, against which the claim of religious offense is made; and b) to protect the values of secularism and religious pluralism. The former is primarily based on an assumption that aggravated form of insult targeted against any religion, or incitement of religious hatred, would invariably lead to problem of maintaining public order, and the authorities must take prompt action in such situation. However, the courts have also evolved certain balancing and protective mechanism with regard to executive action. For example, it has been made mandatory by the court that a notification mentioning the reasons for action should be issued by the concerned authority before a publication is seized or forfeited. Similarly, in case of arrest of author/publisher the authority needs to prove in the court that the act was carried with deliberate and malicious intent. The problem with these balancing mechanisms, however, is that either of these – proving intentions of the arrested individual or the question of validity of the notification issued before forfeiture – can only be tested on

[693] The constitutionality of section 295(A), 153(A) of IPC and section 95 of CrPC have been respectively upheld in *Ramji Lal Modi,* 1957 AIR 620; *Babu Rao Patel*, 1980 A.I.R. 763; *N. Veerabrahmam,* A.I.R. 1959 A.P. 572.

the floor of the courts, which can only happen at a later stage. Considering that the courts take long to deliver judgments (as discussed in chapter 5), the complexities involved get amplified. So, broadly it can be said that government officials can act in these cases based on their own judgment of the situation, which is often guided by the instrumental logic of acting against any publication and its author/publisher, against whom the charges of causing religious offense is made, in order to maintain public tranquillity.

The second argument for restricting freedom of speech and expression is that, though important, freedom of speech and expression does not enjoy any special status in the Indian context,[694] and needed to be balanced against competing fundamental rights. The doctrine of proportionality[695] reigns supreme in such cases, and the courts have maintained that right to profess, practise and propagate ones religion guaranteed under article 25 is one such provision, with which the right to free speech needs to be balanced, when the issue of religious offense crops up. Other than this, the courts have also stressed that in a multicultural secular country, like India, it is the duty of state to protect religious interests of all citizens. This argument has been extended to the protection of religious principles, religious texts, and even religious personage, from attack, as such act is deemed to be a direct attack on faith of the citizens. The courts also try to construct a distinction between criticizing religious practices or rituals, and insulting its principles or symbols, by putting the previous under the category of permissible speech. This distinction, however, as free speech scholars like Peter Jones and Eric Barendt have shown in another context, is very difficult to maintain and prone

694 This position is reflected among the scholars in relation to First Amendment in the US, like Dworkin, and C. Edwin Baker, among others. This view has, however, been effectively questioned, even in the context of US, for example see, Stanley Fish, *There is no thing as free speech: And it's a good thing too* (Oxford: Oxford University Press, 1994); Waldron, *The Harm in Hate Speech*.

695 The doctrine of proportionality broadly means that the application of a given law should not be unreasonable in its reciprocal relationship and a sense of proportion must exist between the ends desired and the means employed. In case of competing fundamental rights it is also used to weigh the impact of a decision by authorities whether the use of law in a case have adverse effect upon the liberties of a person. For an analysis of the complexities involved in the doctrine of proportionality, in relation to human rights, see, Stavros Tsakyrakis, "Proportionality: An assault on Human Rights," *International Journal of Constitutional Law* 7, no. 3 (2009), 468-493. Madhav Khosla's response to this article is equally important. See, Madhav Khosla, "Proportionality: An assault on Human Rights?: A Reply," *International Journal of Constitutional Law* 7, no. 3 (2010), 298-306.

to dissolve, which would mean that the authorities could act against any criticism of religion.[696] At the least, it can be concluded that the position of courts in such cases reflects a sense of ambiguity vis-a-vis the use of statutory laws, and adds significantly to the scope of subjectivity in its interpretation.

The above discussions reflect two prominent aspects about the courts position on the subject of religious offense produced by a publication. Firstly, the courts appear to be providing legal patronage to state actions through a very expansive interpretation of statutory laws and constitutional limitations[697], and secondly, it practices legal paternalism, whereby it guides the citizens regarding what to say, how to say and how much to say.[698] At the same time, the language of the statutory laws, along with the position of the courts in different cases, provides a sense of immunity to religions from criticism. All of this has a deep impact even on historical analysis and other scholarly work concerning religion. In a way, any critical publication on the subject of religion, or a literary piece like novel on the subject of religion, automatically becomes a subject of potential controversy, which restrains the scope for freedom of speech and expression.

The position exhibited by the courts on the subject of religious offense adds to the already existing ambiguity vis-a-vis statutory laws. The impact on freedom to speech and expression is further compounded due to the procedural and functional limitations attached to the legal process in India. The procedural dimensions of legal process that I have discussed in this work, include the practise of "overcharging" and "spurious charging", provision to file suits against the publication in any part of the country, and the time taken in the judicial process to complete leading to severe delays in delivering

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696 Jones, "Blasphemy," 131; Barendt, "Religious Hatred Laws," 129-48.

697 It is not to say that this patronage is uncritical, as exhibited in many judgments, but the overall reading gives a sense that on most occasion courts seem to justify state's response profoundly, when there is a threat to law and order.

698 The courts approach in using "matter-manner" together in analysis of publications, and particularly its suggestion about precaution against language that vilifies. For example, in *Sri Baragur Ramachandrappa,* the court reminds that "It cannot be ignored that India is country with vast disparities in language, culture and religion and unwarranted and malicious criticism or interference in the faith of others cannot be accepted."

judgment. These issues have a direct impact on the freedom of speech and expression of the author/publisher of the publication, which is claimed to be contentious due to its offensive content. The action by government officials create a sense that the publication has been held as problematic, and hence avoidable, even before any judicial trial. For the author/publisher, the legal process itself becomes a form of punishment – both in the form of financial loss as well as psychological harassment. The practise of "overcharging" and "spurious charging" is used by authorities to ensure that the publication is no longer available for consumption, primarily to avoid issues related to public order. The provision that allows cases to be filed anywhere in the country where the impact of the publication is expected, allows for harassment of the author/publisher as they have to appear as respondents, in the courts under whose jurisdiction the case is filed. Though both these issues act as impediments, the most serious harm is caused by the amount of time taken by the courts to deliver final judgment. As shown in chapter 5, the average time taken by the High Courts to deliver the final judgement in cases of contentious publications is 2.63 years and if the case travels to the Supreme Court the judgment takes 6.87 years. This severely jolts the hope for substantive justice from the judiciary. After all this delay, even if the courts orders in favour of the author/publisher, it amounts to severe loss of time and money, and also, the content of the publication might lose its relevance. Therefore the delay indirectly creates a state of indeterminacy and anxiety, and even a positive outcome may appear too costly. Along with this, the history of conflicting and confusing precedents set by courts, in its different judgments, has only made the law look more ambiguous and subjective. This inconsistency only adds to the fear and uncertainty for the author/publisher, about the approach the court would take in their case. As a result, considering all these issues related to law and legal process in India, the author/publisher, as in the case of Wendy Doniger's *The Hindus*, might agree for an out-of-court settlement, thereby conforming to the demands of complaining groups.

The aspects of law and legal process discussed above also contribute in strengthening the role of non-state actors in enforcing censorship. These non-state actors, which primarily claim to be representing the offended community, use the language of law to justify their grievances. It is also reflected in the way law and legal process is used by

the non-state actors, to express their grievances. This can, either be in the form of writ petitions (both civil as well as criminal) filed in the courts against the publication and its author/publisher[699], or as a justificatory means to exert pressure on the government authorities to act against the publication and its author/publisher, or it is also used as a legitimate strategic tool to create public opinion in their favour[700]. The long legal process, that could be tiring and costly, and at the same time the ambiguity in legal interpretation, produce an environment where the author/publisher is forced to impose self-censorship – a phenomena that Cook and Heilmann call "public self-censorship." This can either result in amendments to the original text including significant exclusions, or deletion of controversial portions, or even pulping or withdrawing the publication in controversy.

4. The Legal Discourse on Censorship and the Role of Non-state Actors

The non-state actors, prominently the socio-religious groups, played significant role in the process of censorship even before independence. But after independence their role took a more central stage as they mobilised against publications they considered offensive, and justified this practise in the name of constitutional provisions. They also claimed that it was the duty of the secular Indian state to protect their religious feelings from hurt. These protests and demonstration were seen by the Indian state as democratic rights of the citizens to display their grievances against the publications they felt were religiously offensive.[701] However, there was an important caveat attached to this formal recognition of the democratic rights- that the protests and demonstrations should not be violent in any form. However, scholars on censorship in India have shown that the principle was violated at number of occasions, and in fact, violence became the

699 As in the case of Wendy Doniger's *The Hindus.*

700 Legal opinion becomes one of the important rallying points to create public opinion in such cases. See for example, the writings of Monika Arora, the counsel that appeared on behalf of Dina Nath Batra in several of his law suits against publications.

701 As discussed in Chapter 6.

dominant form of expression, used by the aggrieved groups to exhibit their anguish against contentious publications.[702] These ranged from threatening the author/publisher/seller of the publication, to attacking their houses, or vandalizing property to physical assaults. It has led some scholars to conclude that in India informal censorship[703] is more threatening to freedom of speech and expression than any form of state censorship. Some scholars have tried to link the growth of informal censorship with the rise of Hindu nationalism in late 1980s[704], and others have linked it to the increasing space for mediation[705] and publicization[706], made possible due to changing nature of public sphere, due to diversification of media during this period. I have shown, through different case studies, that these arguments have deep evidential problems. Though the concern in these studies about the role of non-state actors and its threat on freedom of speech and expression are understandable, it is not a new phenomenon. The non-state actors have always been at the centre of enforcing censorship, either by launching formal complaints against publications in the local police station, or mobilizing and demonstrating against the publication to express their hurt sentiments in order to exert pressure on the officials to act. They have also taken the legal route by filing petitions against such publications, or taking part in the judicial process by filing affidavits in the court supporting government's decision to seize or forfeiture contentious publications.

I have argued in this thesis that, in order to understand the role of non-state actors in censorship, one needs to view their modes of participation in censorship in two different ways. One is their role in the legal process, whereby they organize

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[702] Dhavan, *Publish and be Damned*; Kumar, *The Book on Trial*.

[703] Noorani, "Informal Censorship."

[704] Kapoor, "Who Draws the Line?" 20; Ghosh, "Censorship Myths"; Bose, introduction of *Gender and Censorship.*

[705] Arvind Rajagopal, *Politics after Television: Religious Nationalism and the Reshaping of the Public in India* (Cambridge: Cambridge University Press, 2001).

[706] Kaur and Mazzarella, "Between Sedition and Seduction," in *Censorship in South Asia*, 3; Thomas Blom Hansen, "Politics as Permanent Performance: The Production of Political Authority in Locality," in *The Politics of Cultural Mobilization in India*, ed. John Zavos, Andrew Wyatt and Vernon Hewitt (New Delhi: Oxford University Press, 2004), 19-36.

demonstrations and protests in order to attract the attention of state authorities towards their grievances, or they file petitions against such publications in the court, or they present their views against offensive publications in the court as an affected party. The other role is where their form of protests includes threatening the author/publisher/seller of the publication, or the use of violence including vandalizing property, or causing physical harm to author/publisher/seller. The problem with most existing studies on censorship in India is that they look at both of these aspects as part of the larger politics of these groups to impose their viewpoint, which is considered by these studies as antithetical to the spirit of freedom of speech and expression. I have maintained that, these studies use a teleological method, based on the assumptions about the intentions of the groups in question, and in the process, it is often overlooked or ignored, that the former mode of participation is well within the legal and democratic rights of the individuals who form these groups. To demonstrate or protest against a publication, or demanding the state to act against such publications, needs to be delineated from the other mode of participation- one that includes use of violence, which is legally prohibited in any democratic set up. Both these roles should be viewed differently, even if both have tendency to affect the scope of freedom of speech and expression.

This distinction also helps us to understand the problem with the view of scholars who argue that, on account of the possibility of misuse and manipulation of laws by non-state actors, all the statutory laws governing freedom of expression should be repealed.[707] These scholars overlook the fact that if the statutory laws are completely revoked, it would close all doors to raise grievances, even if genuine, against religiously offensive publications. More importantly, it would further strengthen the role of state authorities, who could then act based on their discretion to use available laws, in the name of protecting public order. The absence of statutory laws would also reduce the available space for the court to decide the validity and legality of executive action in such cases.

[707] This kind of argument has been raised variously by scholars like Liang, "Reasonable Restrictions"; Ghosh, "Censorship Myths."

The courts have also been vigilant about non-state actors' use of threats and violence to impose censorship. For example, the courts have advised the authorities to judge the incumbent situation rationally, in case a complaint is received, without getting influenced by the pressure asserted by the socio-religious groups.[708] It has even held that the threat of disruption of public order by such groups is in violation of the law, and should be strictly dealt by law enforcing agencies. Further, the court has also taken serious note that state authorities relent to the demands of such groups and act erroneously at times under pressure from the non-state actors.[709] Recently in the case of Perumal Murugan, the Tamil Nadu High Court specified a preferred procedure to be followed, while dealing with the controversial publication, when the claims about it being offensive are raised by socio-religious groups. The courts have, therefore, exhibited a zero tolerance approach towards use of violence or threat to public order disruptions by these groups.

5. In Lieu of Conclusion

As the discussions above reflect, law and legal process in India (including the role of courts), as in other democracies, plays an extremely significant role in defining the scope of freedom of speech and expression. Most of the statutory laws used to restrict freedom of speech and expression are colonial in nature, but the lawmakers and the courts have continuously stressed its continuing relevance in contemporary India. The lawmakers reflected a paternalistic attitude which is reflective in the debates of the Constituent Assembly, and in the Parliamentary debates, when the amendments to the statutory laws were introduced. Their response to the emergent situation was to enlarge the scope for intervention by the executive in matters related to freedom of speech and expression, so that they could effectively curtail this right, as and when required. They were concerned about protecting the citizens from the misuse of freedom of speech and expression. In an attempt to realize this aim, and also to respond effectively to the

[708] Evident in the courts reading of notification to be issued under requirement of section 95.

[709] Reflected in the courts observations in *S. Rangrajan*, 2 SCC 574; *M/S Prakash Jha*, (Civil) No. 345 of 2011.

context which necessitated such laws, the lawmakers made laws which were vague in language and ambiguous in its scope. The responsibility to protect the fundamental rights of citizens was left for the courts, and was hailed as the sentinel of fundamental rights.

However, an analysis of court's judgments, particularly in cases which involved the claims of religious offense against a publication, reflect a sense of legal paternalism in guiding citizens about the form or manner and matter of speech, suggesting ways about how to express oneself harmlessly. At the same time, it seems to be extending legal patronage to state action by defining its scope widely, particularly for the maintenance of public order and protecting the pluralist and secular values of Indian society. I have argued that this approach of the court not only provides legal acceptance and validity to the category of "religious offense," but also blurs the thin line between insult to religion and criticism of religion, making religion almost immune from any form of enquiry (either historical or sociological), or being subjected to satirical references, or any other form of innovative interpretations. Furthermore, the procedural and functional limitations of the legal process, which primarily includes the delay in reaching to conclusive judgments and high degree of subjective inconsistency in the use of different tests or doctrines in the interpretation of laws, create hurdles in free exercise of one's right to free speech and expression. The paternalistic attitude of the lawmakers and the court along with the problems inherent in the legal process creates conditions where the role of non-state actors (like socio-religious groups) is not only encouraged but also attains significant success in imposing censorship on publications claimed to be religiously offensive. In the process reasonability of restrictions, as required under article 19(2) of the constitution to regulate fundamental right to freedom of speech and expression, is barely defined and remains open to subjective interpretations. This poses the most serious threat to the scope of freedom of speech and expression in independent India.

6. An Agenda for Future Research

Considering the scope of current work, I limited my study to analyse the role law and legal process, particularly the courts, play in the censorship of publications against the

claims of religious offence. This by itself draws a set of limitations within which my project is structured. Firstly, in the process of censorship, courts are not the sole players. There are other stakeholders like non-state actors such as socio-religious groups, about which I have discussed briefly, but future research could focus more on their role as there are cases of censorship where their acts defy the sanctions of law.[710] Concentrating on law and legal process therefore sets its own limitations. Secondly, this being a study about censorship of publications, although I have briefly touched on case laws regarding censorship of other forms of expression or speech acts, they need further and more detailed analysis. Gautam Bhatia's work explores a great deal of this. However, if a comparative study is done on the case laws involving different forms of speech acts, I believe the results could add to the popular understanding about freedom of speech and expression. For example, a study comparing whether the nature and scope of restrictions allowed by the courts on issues of religious defamation similar to that claimed under other cases related to expression, like, defamation of individuals, or press freedom, or election speeches. Other than this a comparative study of legal provisions and case laws within South Asia among countries like India, Pakistan, Sri Lanka, and Nepal, among others, could enrich our understanding about comparative constitutionalism and at the same time help to map the state of freedom of speech and expression among these third world nations, most of which are modern democracies.[711] Also this research primarily deals with the legal aspect of the debate over censorship in India. There are other aspects, like the role of economic considerations, or the role of "publicity" as highlighted by William Mazzarella and Raminder Kaur, in their work on censorship in India.[712] This area is also highly under-researched and has potential for future research. Above all this, there is another area in which future research in the field of censorship could develop – the impact of digitization and internet, and how it is

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[710] It is not to say that no one has done serious work in this field. For example, see, Christophe Jaffrelot, L. Gayer, and M. Maheshwari, "Cultural policing in South Asia," in *Cultural Expression, Creativity and Innovation*, ed. Helmut Anheir and Yudhishthir Raj Isar (Los Angeles: Sage Publications, 2010), 148-58; Malvika Maheshwari, "Violent Regulation and Artists in India: The Transformation of Freedom of Expression" (PhD thesis, Institut d'Etudes Politiques de Paris, Sciences Po, 2011).

[711] This has been attempted in O'Dowd, "Pilate's Paramount Duty," but there is a lot of scope for research beyond what O'Dowd has presented in the article.

[712] Kaur and Mazzarella, "Between Sedition and Seduction."

transforming the discourse of freedom of speech and expression. This holds relevance even for a kind of study undertaken in this thesis, because these new forms of mediation have introduced significant changes in the landscape under which the debate on freedom of expression seems to be operating. Take for example, the case of Wendy Doniger's book *The Hindu*. The publishers decided to withdraw the court case and reach a settlement outside the court, which included the pulping of the text. However, the digital version of the book was already available on the web and recorded a very high circulation. Reacting to this, Doniger said: "I am glad that, in the age of the Internet, it is no longer possible to suppress a book. The Hindus is available on Kindle; and if legal means of publication fail, the Internet has other ways of keeping books in circulation."[713] At the same time, the socio-religious groups have also become vigilant of this new development and have tried to counter it through the legal route. Take for example, the case of Yogesh Master, the author of *Dhundi* which was forfeited by the state officials, after complains from Sri Ram Sene, that the book had mocked the Hindu deity Ganesha, and hurt the religious sentiments of Hindus. While the case was still in the court, a fresh affidavit was filed by the leader of Sri Ram Sene, claiming that Yogesh Master was circulating the digitized version of the book on internet, and it was in violation of the court's position.[714] These controversies are new to the politics of censorship in India, but very relevant for future research. Legal mechanisms and the role of state in controlling the virtual world, and its impact on different forms of expression, is a very promising field where future research could be extended.

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[713] Wendy Doniger, as quoted in "The Hindus controversy: 'Angry' Wendy Doniger says Indian law true villain," *Indian Express*, February 12, 2014.

[714] Yogesh Master filed an affidavit denying the charges. However according to media reports some digitized version was being circulated but the source could not be located. See, "'Dhundi' author accused of sharing PDFs online," *Hindu*, October 7, 2013.

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APPENDIX

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